ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1002, *et al.* (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VILLAGE OF BARRINGTON, ILLINOIS, *et al.*
Petitioners

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

JOINT BRIEF OF RESPONDENTS

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PROOF BRIEF June 22, 2010

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

The parties and intervenors appearing before the Surface Transportation Board (STB or Board) and in this Court are listed in the Joint and Corrected Brief of Community Petitioners. The Respondents are not aware of any amici having entered an appearance before this Court.

B. Ruling under Review

The ruling under review is the following Board decision:

Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company, Finance Docket (FD)-35087, Decision No. 16 (STB served Dec. 24, 2008).

C. Related Cases

The petitions for review in this consolidated case have not previously been before this Court or any other court. There are five related petitions for review before this Court that have been consolidated:

1. *Village of Barrington, Illinois, et al. v. STB*, Case No. 09-1002 (Lead Case);
2. *City of Aurora, et al. v. STB*, Case No. 09-1028;
3. *Forest Preservation District of Will County, Illinois v. STB*, Case No. 09-1048;
4. *Will County, Illinois, et al. v. STB*, Case No. 09-1049; and
5. *Canadian National Railway Company, et al. v. STB*, Case No. 09-1073.

The petitioners in No. 09-1073 and the Board were previously before this Court in Case No. 08-1303, *In Re: Canadian National Railway Company and Grand Trunk Corporation*, where petitioners sought a writ of mandamus related to the same agency proceeding, STB Finance Docket No. 35087. The Court issued its decision denying the petition on November 10, 2008.

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AGENCY DECISIONS**

**Agency decisions are available on Lexis on Westlaw, and Board decisions after November 1, 1996, are also available at www.stb.dot.gov.

STATUTES

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OTHER AUTHORITIES

GLOSSARY

ADT	Average Daily Traffic
Approval	Decision 16 – the Board's December 24, 2008 Decision approving the transaction
CEQ	Council on Environmental Quality
CN	Canadian National Railway Company and Grand Trunk Corporation (unless otherwise noted)
Communities	The communities along the EJ&E line that are challenging the Board's Approval in the consolidated petitions before the Court
CREATE	Chicago Regional Environmental and Transportation Efficiency program
DEIS	Draft Environmental Impact Statement
DOI	Department of Interior
DOT	Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
EJ&E	Elgin Joliet and Eastern Railway Company
EPA	United States Environmental Protection Agency
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
HDR	HDR, Inc. (the third-party contractor that assisted in preparing the EIS)

ICC	Interstate Commerce Commission
ICCTA	Interstate Commerce Commission Termination Act
IDOT	Illinois Department of Transportation
LOS	Level of Service (for grade crossings)
MOU	Memorandum of Understanding (between the Board, CN, and HDR)
NEPA	National Environmental Policy Act
SEA	The Board's Section of Environmental Analysis
STB or Board	Surface Transportation Board
TRACS	Taking Responsible Action for Community Safety Act, H.R. 6707

ISSUES PRESENTED

1. Whether the railroad petitioner waived its claim that the Surface Transportation Board (STB or Board) lacks authority under 49 U.S.C. §11324(c) to impose environmental conditions on its approval of a transaction under 49 U.S.C. §11324(d), or is otherwise estopped from making that challenge.

2. Whether the Board permissibly interpreted §11324(c) as giving it authority to impose environmental conditions on §11324(d) transactions.

3. Whether the Board's grade separation condition was a reasonable exercise of its conditioning authority under §11324(c).

4. Whether the Board's environmental review satisfied the National Environmental Policy Act (NEPA).

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in the addendum.

STATEMENT OF THE CASE

On October 30, 2007, Canadian National Railway Company and its U.S. subsidiary, Grand Trunk Corporation – collectively CN – sought Board approval to acquire EJ&E West Company, a wholly owned subsidiary of U.S. Steel Corporation, in order to reroute freight traffic from congested CN rail lines in Chicago to the underutilized line of the Elgin, Joliet & Eastern Railway Company (EJ&E line) that bypasses Chicago. After conducting a thorough environmental

review under NEPA, 42 U.S.C. §4321 *et seq.*, the Board approved the transaction, subject to numerous environmental conditions to lessen impacts on communities along the EJ&E line, where, depending on the segment, train traffic will increase from as few as 4 trains a day to as many as 42. *Canadian National Railway & Grand Trunk Corp. – Control – EJ&E West Co.*, Finance Docket (FD)-35087 (STB served Dec. 24, 2008) (*Approval*).

CN argues that the Board lacked authority to impose environmental conditions. Alternatively, it challenges the reasonableness of Condition 14, which calls for grade separations (underpasses or overpasses) at two highway crossings and assigns a majority of the cost to CN. Communities argue that the Board's environmental review and conditions were inadequate.

STATEMENT OF FACTS

A. Regulatory Framework

Since 1920, Congress has vested in the Interstate Commerce Commission (ICC) and now the STB[1] plenary and exclusive authority over rail mergers and acquisitions (collectively "mergers"). 49 U.S.C. §11321(a). A railroad may not acquire another railroad or any of its lines without STB approval. 49 U.S.C.

[1] In the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress abolished the ICC, modified the Interstate Commerce Act, and transferred the ICC's remaining rail regulatory functions to the Board. We use "agency" to refer to ICC/STB interchangeably.

§11323. Board approval of any rail merger exempts the merging carriers from "all other law," including state and local environmental laws, "as necessary" to let the carriers carry out the transaction. 49 U.S.C. §11321(a).[2]

Today, mergers between two Class I railroads[3] ("major" transactions) are reviewed under the "public interest" approval standard in 49 U.S.C. §§11324(b)-(c). Other (i.e. "non-major") mergers are reviewed under the "competitive effects" approval standard in 49 U.S.C. §11324(d), which directs the Board to approve the transaction unless it would produce anticompetitive effects that outweigh the transportation benefits it would produce. The instant transaction was reviewed under this latter standard. The Board's longstanding view is that §11324(c) authorizes it to impose conditions in all railroad mergers.

[2] In ICCTA, Congress also broadened the general regulatory preemption, making the Board's jurisdiction exclusive for all rail transportation and rail facilities that are part of the national rail network – including intrastate operations and ancillary track for which a Board license is not required. *See* 49 U.S.C. §§10501(a)(2)(A), (b)(2), 10906. This preemption precludes all state and local regulation that would prevent or unreasonably interfere with rail operations, regardless of whether the Board actively regulates the particular railroad activity involved. *E.g., Green Mt. R.R. v. Vermont,* 404 F.3d 638 (2d Cir. 2005).

[3] Railroads are classified by annual operating revenues (adjusted to 1991 dollars): Class I ($250 million or more), Class II (below $250 million but above $20 million), Class III ($20 million or less). 49 C.F.R. §1201, General Instruction 1-1.

B. This Case

1. CN's proposed merger

CN owns five rail lines that serve Chicago, the nation's busiest rail freight gateway. All seven Class I railroads, along with smaller railroads and other modes of transportation, interchange freight in Chicago. The freight lines are shared by commuter rail operators and Amtrak. It can take 30 hours to move a freight car through Chicago.[4]

The EJ&E owned a 198-mile rail line in northeastern Illinois and northwestern Indiana that arcs around Chicago and connects with many other lines, including CN's five lines. Traffic on the EJ&E had declined over the years from as many as 50 freight trains per day to 3-18 trains per day.[5]

On September 25, 2007, CN agreed to buy the EJ&E West Company (a new EJ&E subsidiary to which EJ&E rail assets would be transferred), so that CN could reroute its through traffic around Chicago. Rerouting would produce environmental benefits for communities along CN's existing lines in or near Chicago, but would adversely impact communities near the EJ&E line, which are

[4] Draft EIS (DEIS) 2-3 (JA ___); *Approval* 4 n.5 (JA ___).

[5] *Approval* 4-5 (JA ___).

already stressed by existing vehicular congestion and passenger and freight rail traffic.[6]

2. CN's application and the Board's decision to prepare an EIS

On October 30, 2007, pursuant to the Board's procedures for review of proposed acquisitions (49 C.F.R. Part 1180), CN filed its application, asked that it be processed under §11325(d) (for "minor" transactions), and proposed a 156-day schedule.[7] CN acknowledged that the anticipated traffic increase on the EJ&E line required environmental review under NEPA.[8]

NEPA directs federal agencies to consider the environmental consequences of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Under the Council on Environmental Quality (CEQ) regulations implementing NEPA (40 C.F.R. Parts 1500-08), "major federal actions" include regulatory approval of projects proposed by private parties. 40 C.F.R. §1508.18. The Board's environmental rules (49 C.F.R. Part 1105) apply to all rail mergers, including those under §11324(d). 49 C.F.R. §1105.6(b)(4), (c)(2)(i).

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[6] *Approval* 2 (JA ___).

[7] CN-2, Railroad Control Application 13, 21 (JA ___); CN-3, Petition Suggesting Procedural Schedule 1-2 (JA ___).

[8] Application 32-33 (JA ___).

The level of NEPA review depends upon the potential for significant impacts.[9] The Board's environmental rules recognize that it is not the size of the railroads involved in a merger, but the merger's expected operational changes that determine the likelihood and potential magnitude of impacts. Merger applicants must submit information about their proposed operations so that the Board can determine the appropriate level of environmental review. The rules presumptively require an EA for rail mergers expected to cause increases in trains per day, rail traffic, or rail yard activity above certain thresholds. 49 C.F.R. §1105.6(b)(4), (c)(2)(i). An EIS may be required where merger-related operational changes are expected to cause potentially significant impacts. 49 C.F.R. §1105.6(d).

In *Decision 2*, served November 26, 2007, the Board accepted CN's application, designated the transaction as "minor," but concluded that the potential adverse environmental effects warranted an EIS. The Board set a schedule for submitting evidence on non-environmental issues and announced that it would not rule on the merits until the environmental review was completed. *Decision 2* at 2

[9] Agencies must prepare a detailed Environmental Impact Statement (EIS) for proposals that would significantly affect the quality of the human environment. 42 U.S.C. §4332(2)(C). Agencies may prepare a more limited Environmental Assessment (EA) to determine whether a full EIS is necessary or whether, with appropriate mitigation, they can make a Finding of No Significant Impact. 40 C.F.R. §§1501.3, 1501.4. Actions whose environmental effects are ordinarily insignificant may be "categorically excluded" from case-specific analysis absent extraordinary circumstances. 40 C.F.R. §1508.4.

(JA ___). Noting that in prior cases the EIS process had taken at least 18 months, the Board stated that, to accommodate the EIS process, its final decision would not be issued within 180 days. *Id.* 15-16 (JA ___).

3. Proceedings on Non-Environmental Issues

Numerous parties thereafter submitted their comments and requests for conditions on transportation-related issues. *Approval* 6-8 (JA ___). While CN argued in reply that many of these requests went too far, CN acknowledged the Board's authority to impose conditions to address merger-related concerns, including environmental concerns.[10]

4. NEPA Review (Scoping & Draft EIS)

The Board's Section of Environmental Analysis (SEA) first examined the scope of environmental issues to be addressed in the EIS. *See* 40 C.F.R. §1501.7. SEA published a notice requesting comments on a draft scope. CN commented that the Board "should apply the same standards for review and mitigation as have

[10] CN-29, Applicant's Response to Comments, Requests for Conditions, and Other Opposition & Rebuttal in Support of the Application (filed Mar. 13, 2008) at 3-5, 18-19 (JA ___).

been applied in previous environmental reviews."[11] Based on all comments received, SEA issued a final scope in April 2008.

SEA then conducted an in-depth environmental analysis, including consultation with governmental agencies and stakeholder groups, and site visits to the area. On July 25, 2008, SEA issued a 5-volume DEIS, which addressed a wide range of issues and set forth preliminary conclusions on alternatives, potential impacts, and possible mitigation (beyond that volunteered by CN) to reduce potential adverse environmental effects.

5. The TRACS Bill

Congressional opposition to the transaction resulted in introduction of H.R. 6707, the Taking Responsible Action for Community Safety Act (TRACS), on July 31, 2008. TRACS proposed to amend §11324 to require disapproval of a merger involving any Class I railroad if the adverse safety or community impacts would outweigh the transportation benefits, and to authorize the Board expressly to impose conditions to mitigate such impacts.

At a September 9, 2008 hearing before the House Committee on Transportation and Infrastructure, CN's President and CEO, E. Hunter Harrison,

[11] EI-5565 at 15 (JA ___) ("EI" and "EO" designations refer to the certified administrative record's numerical references for environmental incoming (Volume II) and outgoing (Volume III) correspondence, respectively).

testified that the legislation was unnecessary because the Board already had authority to conduct NEPA reviews and impose environmental conditions in §11324(d) cases. His written statement, offering "CN's perspective,"[12] explained (*id*. at 105):

> Relying on its current statutory authority, the Board conducts a thorough review of any significant environmental effects arising from a control transaction. No further legislation is required for the Board to accomplish this goal. . . . If a transaction that is in the public interest has significant adverse environmental impacts, the answer is to reasonably mitigate those impacts. The railroad's fair share of those costs should be determined in light of any offsetting environmental benefits produced by the transaction, the causes of the impacts to be mitigated, and the relative benefits to be realized by the parties from mitigation.

His oral testimony (*id*. at 51) reiterated this position:

> Mr. OBERSTAR. Now, Mr. Harrison . . . Do you think the Board has authority to modify substantially, to direct modifications on public interests grounds? That is safety and environmental considerations.
>
> Mr. HARRISON. Our view is that under the existing act, a minor transaction cannot be turned down on environmental issues. It can be mitigated or there can be conditions placed that say you can only merge if you will mitigate, if you will do the following.

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[12] *The Taking Responsible Action for Community Safety Act: Hearing on H.R. 6707 Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. 100, 101 (2008) (Committee Hearing) (statement of E. Hunter Harrison, President and CEO, Canadian National Railway Co.), *available at* http://frwebgate.access.gpo.gov /cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:44651.pdf.

> . . . If the transaction is pro-competitive and it is not anti-competitive, then the issue becomes—and we are perfectly willing to deal with that—to resolve the environmental issues, mitigate the environmental issues.

TRACS was voted out by the Committee and debated on the House floor on September 27, 2008.[13] Representative Shuster, the ranking minority member of the Committee, opposed the bill, stating that the STB already had authority to impose environmental conditions on CN.[14] The bill failed to pass the House.[15]

6. CN's Petition for Writ of Mandamus

Meanwhile, on May 13, 2008, CN had asked the Board to complete the EIS and serve a final decision by December 1, 2008, so that it could close the transaction by December 31, 2008 (the contract closing date). In *Decision 13,* served July 25, 2008, the Board set December 1, 2008, to January 31, 2009, as a target period for issuance of the Final EIS (FEIS), with a final decision to follow soon thereafter. On August 14, 2008, CN asked the Board to rule that the transaction satisfied the §11324(d) criteria and to authorize CN to take control of

[13] 154 Cong. Rec. at H10158-64 (daily ed. Sept. 27, 2008).

[14] *Id*. at H10159. In a September 23, 2008 letter to the Committee, Mr. Harrison corrected erroneous statements by other witnesses about the transaction, but did not inform the Committee that CN had since challenged the Board's authority to impose environmental conditions in its petition for mandamus in this Court, s*ee* p. 11, *infra*. Committee Hearing at 109-117.

[15] 154 Cong. Rec. at H10223-34.

EJ&E in advance of the FEIS and final decision. The Board denied that request in *Decision 14*, served September 8, 2008.

On September 18, 2008, CN petitioned this Court for a writ of mandamus requiring the Board to issue its final decision before December 31, 2008. Contrary to its president's testimony to Congress nine days earlier, CN suggested that the entire NEPA process was irrelevant because the Board lacked authority to mitigate adverse environmental effects of the transaction.[16] The Board opposed the petition, which the Court denied on November 10, 2008.

7. The Final EIS

SEA held 8 open house/public meetings throughout the Chicago area during the 60-day period for public comment on the DEIS, which ended September 30, 2008. SEA received over 9,500 comments on the DEIS. On page 148 of CN's 152-page comment, submitted on September 30, 2008, CN questioned the Board's authority to require mitigation of adverse environmental effects, characterizing it as "unclear."[17] But CN also proposed additional voluntary conditions to address environmental concerns raised by other commenters.[18]

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[16] *In re Canadian Nat'l Ry.*, No. 08-1303 (D.C. Cir. pet. filed Sept. 18, 2008) at 26-28.

[17] EI-14176 at 148-49 (JA ___).

[18] *Id*. at 2-17 (JA ___).

The 3,100-page FEIS was issued on December 5, 2008. It addressed the comments on the DEIS, presented additional analysis and evaluated new information suggested by commenters. As pertinent here, it undertook additional study of potential impacts on quality-of-life issues in communities along the EJ&E line; hazardous materials transport; noise and vibration; potential effects on at-grade highway crossings; emergency services; safety; and mobility.[19] The FEIS recommended extensive mitigation to minimize the impacts associated with moving traffic onto the EJ&E line.[20]

The FEIS found that communities located along CN's existing lines would benefit from reduced train frequency, resulting in less traffic, delay, noise, air emissions, etc. However, the FEIS acknowledged that these benefits would not necessarily be permanent, because CN could add trains on those lines if traffic grows beyond what CN's operating plan contemplates.[21]

8. The Board's *Approval*

The Board issued its *Approval* on December 24, 2008. It concluded (at 13-15 (JA ___)) that the §11324(d) standards were met because substantial competitive effects were unlikely. Moreover, to the extent that minimal

[19] *See Approval* 35-36, 48-53 (JA ___); FEIS ES-9 to ES-13 (JA ___).

[20] FEIS Chap. 4 (JA ___); *see* DEIS Chap. 6 (JA ___).

[21] FEIS ES-20, 4-3 (JA ___).

anticompetitive effects might result, the Board found that the benefits to transportation in the Chicago area would outweigh such effects.[22] *Approval* 2, 15, 37 (JA ___).

The Board then turned to CN's argument seeking to challenge the agency's authority to impose environmental conditions on §11324(d) transactions. *Approval* 29-34 (JA ___). The Board concluded that CN was barred from contesting the applicability of NEPA and the agency's authority to attach environmental conditions in this case under principles of waiver (given CN's delay in raising this argument) and estoppel (given CN's inconsistent positions, including its unequivocal Congressional testimony), respectively. *Approval* 29-30 (JA ___). Nevertheless, the Board discussed the basis of its authority to impose environmental conditions in §11324(d) transactions, "for the benefit of future applicants." *Approval* 29 (JA ___).

The Board explained that §11324(c) gives it explicit authority to impose conditions on all rail mergers subject to §11324, including §11324(d) transactions. *Approval* 31 (JA ___). It stated that the agency never considered the enactment of

[22] As the STB explained, "[b]ecause Chicago is the nation's largest rail hub and one-third of all rail freight in the United States moves to, from, or through Chicago, reducing congestion in Chicago would have wide-ranging beneficial impacts on the movement of freight throughout the country." *Approval* 37 (JA ___).

§11324(d) as restricting the Board's authority to require environmental mitigation and, where appropriate, has imposed environmental conditions in §11324(d) mergers. *Id*. The Board found "inapposite" two cases cited by CN for the proposition that the Board's conditioning power in a §11324(d) merger had been judicially determined to be limited to competitive conditions, because neither case addressed the Board's authority to mitigate adverse environmental impacts of rail mergers.[23]

The Board found no indication that Congress intended to preclude it from imposing conditions to mitigate significant adverse environmental effects in §11324(d) transactions. *Approval* 33-34 (JA ___). And it found policy support in NEPA for interpreting the "may impose conditions on the transaction" language of §11324(c) as including environmental conditions, because Congress directed agencies to interpret their statutes, regulations and policies in accordance with NEPA's environmental protection policies "to the fullest extent possible." *Approval* 32 (citing 42 U.S.C. §4332) (JA ___). The Board also found that any suggestion that Congress intended to exempt smaller transactions from environmental review under NEPA was refuted by the fact that Congress had

[23] The Board noted that *Illinois v. ICC*, 687 F.2d 1047 (7th Cir. 1982) (*State of Illinois*), did not discuss the scope of the agency's conditioning authority, and that the discussion of conditioning in a footnote in *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 301 n.3 (D.C. Cir. 1983), was *dicta* and not addressed to environmental conditions. *Approval* 32 n.71 (JA ___).

considered exempting §11324 transactions from NEPA in the bills leading to the same 1980 legislation in which §11324(d) was added, but had chosen not to do so. *Approval* 31 & n.67 (JA___).[24]

Finally, the Board pointed out[25] the important policy reason "why [its] conditioning authority must be construed to permit environmental mitigation": under §11321(a) approval of the transaction would exempt the merging carriers from "all other law," including state and local environmental laws, "as necessary" to let the railroads carry out the transaction and operate the rail property. The Board explained that, without environmental conditioning authority, the local communities along the EJ&E line would be powerless to get CN to mitigate the substantial merger-related environmental impacts they will experience in order for the nation to have a more efficient freight rail system. *Approval* 33-34 (JA ___).

Regarding the environmental review, the Board was satisfied that the EIS had addressed the reasonable and feasible alternatives in this case and had adequately examined the potential environmental impacts. Accordingly, the Board adopted SEA's analysis and conclusions. *Approval* 38 (JA ___). The Board

[24] The Board rejected any suggestion that Congress had implicitly determined that NEPA does not apply to "minor transactions" because the 180-day review period is too short to complete an environmental review. *Approval* 32-34 (JA ___). CN is not contesting the applicability of NEPA here. Br. 21 n.14.

[25] *Approval* 33 (JA ___).

imposed over 200 conditions to mitigate the effects of the transaction. *Approval* App. A (JA ___). The conditions include: grade separations (overpasses or underpasses) at two highway crossings (Ogden Avenue, near Aurora, Illinois, and Lincoln Highway, in Lynwood, Illinois),[26] with CN to bear 67% and 78.5%, respectively, of the costs;[27] installation of camera systems at 17 at-grade crossings to monitor train movements and assist in timely emergency response;[28] hazardous materials and safety mitigation; and noise mitigation (including for Barrington, Illinois). The Board also required CN to file quarterly reports for five years so that the effectiveness of the conditions can be assessed. And it established a five-year operations oversight period, with detailed monthly reporting for the Board to monitor CN's operations. *Approval* 25-26 (JA ___). CN also must comply with its voluntary mitigation commitments[29] and with agreements it negotiated with Amtrak and various communities for tailored mitigation.

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[26] *Approval* 76 (JA _). These were the only two crossings to meet specific Federal Highway Administration (FHWA) guidelines for grade separations, and they also had other unique characteristics making them the most severely affected. *See infra* at 47-48; *see also* FEIS 4-5, 4.2.3.1 (JA ___).

[27] The grade-separation condition provides that, if the remaining funds are not committed and construction initiated by 2015, CN will be released from that financial responsibility. *Approval* 76 (JA ___).

[28] *Approval* 77 (JA ___).

[29] CN's voluntary mitigation addresses such matters as grade crossings, hazardous materials, land use, emergency vehicle delay, community outreach, noise and vibration, and biological and water resources. *Approval* 59-73 (JA ___).

The Board recognized that the transaction may have adverse effects that will not be fully mitigated, and that, even with mitigation, there will be vehicle delays at highway/rail at-grade crossings. *Approval* 53 (JA ___). But the Board was satisfied that its mitigation would "provide appropriate safeguards to ensure that applicants maintain safe operations and protect the environment and the quality of life in affected communities to the extent practicable." *Id*.

Barrington, the lead petitioner in No. 09-1002, sought an administrative stay of the *Approval* pending judicial review, which the Board denied in *Decision 18,* served January 16, 2009. On January 22, 2009, this Court denied a judicial stay request. CN consummated the transaction on January 31, 2009.

SUMMARY OF ARGUMENT

CN's primary argument – that the Board lacks authority under §11324 to impose environmental conditions on this transaction – should be dismissed. CN did not present any such argument at any point in the first 11 months that its application was pending. Rather, CN waited until the last day for comments on the DEIS – when there was no opportunity for reply – to present the argument. CN therefore forfeited any right to raise this claim here. Moreover, in the first 11 months, CN repeatedly acknowledged – before the Board and Congress – the agency's authority to impose environmental conditions in this case. Therefore,

alternatively, CN should be barred by estoppel principles from making a no-authority claim here.

If the Court reaches the merits of CN's argument, it should affirm the Board's determination that §11324(d) provides the standard for approval, while §11324(c) provides authority to condition that approval. The statute is ambiguous. Nothing in §11324(c) or (d) speaks to the precise issue. Indeed, CN itself described the statute as "unclear" when it belatedly presented the no-authority issue to the Board. And the relevant legislative history of the 1980 legislation creating §11324(d) shows that Congress considered exempting mergers from environmental review, but decided against that.

The Board's reading of the statute is permissible because nothing in §11324(c) limits the conditioning power, and nowhere does §11324(d) say that approval must be unconditional. Under the portion of the Rail Transportation Policy added by the 1980 legislation, the statute should be interpreted and applied so that railroads operate without detriment to public health and safety. And in a rulemaking contemporaneous with the legislation, the agency did not view that legislation as requiring different environmental treatment for major and non-major transactions. The Board's interpretation also is good policy because, without Board-imposed mitigation, affected communities would have no recourse for merger-related environmental harms, given the merger preemption in §11321.

The Board's determination that the two grade separations were warranted – and that CN should be allocated costs based on the transaction-related impacts rather than pre-existing conditions – was reasonable and conformed to both agency policy and judicial precedent, including Supreme Court precedent, establishing that a railroad should be responsible for reasonable infrastructure improvements attributable to its presence.

Communities' arguments that the Board's environmental review was flawed and its imposition of mitigation did not go far enough are baseless. As NEPA requires, the Board's review studied reasonable and feasible alternatives; evaluated the direct, indirect, and cumulative impacts of the transaction; identified those resources that would suffer adverse effects; and studied mitigation to ameliorate such effects. The Board properly discussed and reasonably selected those mitigation measures it found appropriate. Communities have failed to show that the Board's analysis was inadequate or that its mitigation choices were arbitrary and capricious. Finally, Communities' arguments that the Board failed to properly select and supervise the third-party contractor are unsupported.

ARGUMENT

I. THE SCOPE OF REVIEW IS NARROW.

Statutory Interpretation. Under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a court reviewing an agency's

interpretation of its statute must first determine whether Congress has spoken directly to "the precise question at issue" ("*Chevron I*"). 467 U.S. at 842. If Congress' intent is clear, "that is the end of the matter." *Id.* at 842-43. But, where the statute is "silent or ambiguous with respect to the specific issue," the court decides whether the agency's interpretation is a permissible and reasonable construction of the statute ("*Chevron II*"). *Id.* at 843. The agency's construction need not be the only permissible construction, or the one the court would have reached. *Id.* at n.11. It is the agency's responsibility to formulate policy and make rules to fill any gap left, implicitly or explicitly, by Congress. *Id.* at 843. The court should give deference to the agency's interpretation and "may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the agency]." *Id.* at 843-844.

Imposition of Conditions. The role of courts in reviewing rail merger decisions is limited to determining whether the agency's conclusions are reasonably drawn from the evidence and findings in the case. *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 69 (1966). The Board's use of its conditioning authority must be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). Because §11324(c) broadly provides that "[t]he Board may impose conditions governing the [merger] transaction …," the Board's decisions regarding conditions

are entitled to "great deference." *Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708, 720-21 (D.C. Cir. 1984). *Accord Commuter Rail Div. of the Reg'l Transp. Auth., Metra v. STB*, – F.3d –, 2010 WL 2363214 at *6 (D.C. Cir. June 15, 2010) (*Metra*).

NEPA Compliance. NEPA does not mandate particular results but simply prescribes the necessary process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). Once potential environmental effects are adequately identified and evaluated, NEPA does not prevent the agency from deciding that other values outweigh the environmental costs. *Id.* A reviewing court's role "is simply to ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not arbitrary or capricious." *Communities Against Runway Expansion v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004) (internal quotations omitted). *See also Nevada v. Dep't of Energy*, 457 F.3d 78, 87-88 (D.C. Cir. 2006). Thus, reviewing courts may not substitute their judgment for the agency's. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

II. CN IS PRECLUDED FROM CHALLENGING THE BOARD'S AUTHORITY TO IMPOSE ENVIRONMENTAL CONDITIONS HERE.

It is settled law that courts "should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A.*

Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952). Objections must be timely and forcefully made. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553-54 (1978). Thus, a railroad forfeits an argument, including an argument that the Board lacks statutory authority to take a challenged action, when it "fail[s] to raise it in a timely manner before the Board." *BNSF Ry. v. STB*, 604 F.3d 602, 604 (D.C. Cir. 2010).

Here, CN forfeited its claim that the Board lacks authority to impose environmental mitigation conditions on this non-major transaction. For the first 11 months of the Board proceeding, when CN might have been expected to raise such a crucial issue, CN instead led the Board and the merger opponents to believe that it agreed that the Board had such authority. Only toward the end of the proceeding, when there was no opportunity to reply, did CN contest the Board's authority, and even then it said only that the Board's authority was "unclear" – not, as it does now – that the plain language of §11324 clearly shows a lack of Board authority.[30]

[30] The Board determined, "by analogy to the doctrine of judicial estoppel," that CN was barred from challenging the Board's authority after its clear statements to the contrary "before the Board and Congress." *Approval* 29-30 (JA ___). CN argues (Br. 19-21) that the doctrine of judicial estoppel is inapplicable to Congressional testimony. It ignores the contradictory statements it made throughout the Board proceeding. And whether or not estoppel principles bar CN from now taking a contrary position, well-developed waiver principles plainly do.

CN, moreover, was well aware of the Board's longstanding view that it has the authority to impose environmental mitigation conditions in non-major mergers.[31] Indeed, the Board had imposed safety-related environmental conditions in prior CN §11324(d) cases.[32] Thus, CN had an obvious obligation to raise its objections to the Board's conditioning authority clearly and early in the proceeding so that the issue could be fully aired. Yet, despite multiple opportunities, CN did not present its challenge in this case until there was no opportunity remaining in the expedited schedule for other parties to respond. Until the last minute, every time that it could have presented the no-authority issue, CN indicated its agreement with the Board's view or remained silent. In particular:

-- At the outset of the case, CN expressly said that an EA or EIS was appropriate and agreed to pay for a third-party contractor without reservation or protest.[33]

-- In November 2007, when the Board concluded that the potential environmental impacts warranted an EIS, CN's filings explicitly acknowledged that the Board may need to prepare an EIS and that the Board's "approval could be

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[31] *See* cases cited at n.66, *infra*.

[32] *Canadian Nat'l Ry. – Control – Duluth, Missabe & Iron Range Ry.,* FD-34424 at 20-23 (STB served Apr. 9, 2004) (*CN-DMIR)*; *Canadian Nat'l Ry.– Control–Wisconsin Cent. Trans. Corp.*, FD-34000 at 23-27 (STB served Sept. 7, 2001) (*CN-Wisc. Cent.*).

[33] Application 32-33 (JA ___).

conditioned on appropriate mitigation of any adverse environmental effects that might be found."[34]

-- In February 2008, during the comment period on the Draft Scope of the EIS, CN said the Board could not authorize the transaction until the EIS was complete and should "apply the same standards for review and mitigation as have been applied in previous environmental reviews."[35]

-- In March 2008, when it responded to the January 2008 comments of parties who requested various conditions, CN acknowledged that the Board may impose environmental and other conditions to address merger-related impacts.[36]

-- In May 2008, when CN asked for expedited completion of the EIS so the transaction could close before December 31, 2008, because the record showed the transaction satisfied the §11324(d) standard, CN did not claim that the Board lacked authority to impose environmental conditions.[37]

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[34] CN-8, Reply of Applicants to Request of Village of Barrington for Preparation of EIS (Nov. 21, 2007) at 1, 7-8 (JA ___). In another pleading filed the same day, CN again acknowledged that the Board's approval could be "subject to conditions requiring appropriate mitigation of its adverse environmental effects." CN-7, Applicants' Reply to Comments of Congressman Peter J. Visclosky, et. al (Nov. 21, 2007) at 8 (JA ___).

[35] EI-5565 at 15 (JA ___).

[36] *See* discussion at p. 7, *supra*.

[37] *See* CN-33, Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision (May 13, 2008) at 1-25 (JA ___).

-- On September 9, 2008, to avert legislation, CN's President testified before Congress that the Board already had the authority to conduct NEPA reviews and attach environmental mitigation conditions in §11324(d) cases.[38]

-- On September 30, 2008 – as the record was closing, a full 11 months after CN filed its application – after 147 pages of specific comments on the DEIS, CN for the first time sought to challenge the Board's authority to mitigate the adverse environmental effects of the transaction as "unclear."[39]

Even if this weak, last-minute statement were taken as a denial of the Board's authority, it was too late to be considered, because, under the abbreviated schedule set at CN's urging, there was no opportunity for reply comments. This

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[38] *See* pp. 8-10, *supra* (CN's testimony). CN now asserts (Br. 19) that its President was giving his personal, non-lawyer's interpretation. But Mr. Harrison stated that he was presenting "CN's perspective." Committee Hearing at 35.

[39] EI-14176 at 148-49 (JA ___). In footnote 2 of a 29-page letter to SEA dated April 21, 2008, responding to SEA's requests for more detailed information on CN's operating plan, CN stated that "it is an open question whether NEPA should be applied differently in a 'minor' proceeding," that "it is also not clear whether there is a legal basis in ICCTA or NEPA for qualifying [approval] on the basis of environmental factors unrelated to protection of competition," and that "it is possible that [SEA's environmental review] cannot provide the basis for the exercise of the STB's conditioning power." EI-7207 at 6 (JA ___). CN stated that it did not "expect these issues to be joined in this case," but wanted all parties to "be aware of the possibilities." *Id*. This letter was included in Appendix Q to the DEIS. However, this hardly constituted either a forceful presentation or fair notice to the public of such an important argument. And CN does not suggest that it raised the no-authority issue in that footnote. *See* Br. 2 (alleging it timely raised "no-authority" issue in September 2008).

was an abuse of the administrative process and a clear violation of *Tucker Truck.* A party's failure to present an issue in an administrative proceeding until it is too late for opposing parties to respond is waived.[40]

III. THE BOARD MAY IMPOSE CONDITIONS, INCLUDING ENVIRONMENTAL CONDITIONS, ON ITS APPROVAL OF RAIL MERGERS UNDER 49 U.S.C. §11324(d).

If the Court reaches the merits, it should reject CN's claim that the Board lacks conditioning authority over §11324(d) transactions or that the conditioning authority is limited to competition issues.

CN's own words and actions demonstrate that the plain language of §§11324(c) and (d) does not preclude the Board from imposing environmental conditions on non-major mergers. After repeatedly telling the Board and Congress that the Board had authority to impose environmental conditions here, when CN

[40] *Vermont Yankee,* 435 U.S. at 553-54; *Otter Tail Power Co. v. STB,* 484 F.3d 959, 962-63 (8th Cir. 2007) (complaining shipper in an STB rate case was "fatally late" when it raised an issue at a point in the proceeding when there was no opportunity to reply). The requirement to raise an issue before the agency in a timely manner is not simply for the agency's benefit; it is essential so that other litigants are not surprised on appeal by issues upon which they had no opportunity to respond in the agency's proceeding. *Sims v. Apfel*, 530 U.S. 103, 109 (2000). Thus, even though the agency discussed its authority, that does not mean that CN's eleventh-hour challenge is sufficient to entitle it to judicial review of that issue.

finally presented the statutory issue to the Board it did not make a plain language argument, but instead described the statute as "unclear."[41] CN was correct.

The STB has plenary and exclusive authority over rail mergers (as did the ICC). 49 U.S.C. §11321(a). For decades the statute contained a public interest approval standard for all merger reviews, and the ICC had broad authority to condition all merger approvals. At the time NEPA was enacted the statute provided:

> If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction . . . will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.

49 U.S.C. §5(2) (1970). This was the wording of the statute when the ICC first promulgated guidelines to implement NEPA in 1972,[42] and when it revised them in 1976.[43] Significantly, in issuing the 1976 revisions, the ICC stated its general policy that "adverse environmental effects should be minimized to the fullest extent practicable consistent with the national transportation policy and other

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[41] EI-14176 at 148-49 (JA ___).

[42] 49 C.F.R. §1100.250 (1972).

[43] 49 C.F.R. Part 1108 (1976). In 1976, Congress temporarily added alternative expedited procedures for rail mergers sponsored by the Secretary of Transportation. Those procedures, which did not limit the ICC's broad conditioning power and explicitly included consideration of environmental and community impacts, 49 U.S.C. §5(3) (1977), expired in 1982.

national policies affecting Commission action," and that it would view its traditional policies and missions in the light of national environmental objectives. 49 C.F.R. §§1108.3(a), (b) (1976).

In 1978, Congress recodified the Interstate Commerce Act "without substantive change," and the merger provisions in §5(2) were placed at 49 U.S.C. §§11343-45.[44] Thus, in 1979, the agency had broad conditioning authority over all rail mergers, and its NEPA guidelines applied to all railroad mergers. In 1979, therefore, the ICC had authority – and we do not understand CN to deny – to impose conditions to alleviate environmental or community impacts. *See Southern Pac. Transp.*, 736 F.2d at 721 ("The Commission has extraordinarily broad discretion to impose protective conditions, 49 U.S.C. §11344(c), and courts have appropriately given the Commission's selection of such conditions great deference."); *accord Metra*, 2010 WL 2363214 at *6 (same for a §11324(d) transaction).

CN is wrong (Br. 6-10) that all this changed for non-major transactions such as this when Congress passed the Staggers Rail Act of 1980.[45] By 1980, Congress had concluded that the ICC was too slow in deciding non-controversial cases

[44] Pub. L. No. 95-473, 92 Stat. 1337 (1978).

[45] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

"where approval [was] routinely and consistently granted."[46] Thus, for the first time Congress separated rail mergers based on the size of the merging railroads:[47] (1) proceedings involving merger of two or more Class I railroads (labeled major transactions); (2) proceedings not involving merger of at least two Class I railroads but having national or regional transportation significance; and (3) proceedings not involving merger of at least two Class I railroads and not having national or regional transportation significance (labeled "minor").[48]

Congress also added a new approval standard for non-major mergers, §11344(d) – now §11324(d) – which directed the agency to approve the transaction unless:

> (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
>
> (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Staggers did not, however, alter §11344(c) – now §11324(c) – which continued to provide that the agency "may impose conditions on the transaction."

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[46] H. Rep. No. 96-1430 at 121 (1980) (Staggers Conf. Rept.) *as reprinted in* 1980 U.S.C.C.A.N. 4110, 4152-53.

[47] *See* n.3, *supra*.

[48] Staggers also set deadlines for agency action for the three types of transactions. For "major transactions" the agency has 16 months. For transactions "of regional or national transportation significance," it has 300 days. For "minor transactions" it has 180 days. 49 U.S.C. §11325(b), (c), (d).

Nor did Staggers show any Congressional intent to limit the ICC's consideration of the environmental impacts of regulated actions. In fact, Congress had considered, but decided against, exempting all railroad mergers from NEPA.[49] Instead, it expanded the rail transportation policy to include "operat[ion of] transportation facilities and equipment without detriment to the public health and safety." 49 U.S.C. §10101a(8) (1982). The issues the agency addresses through its NEPA procedures include issues of "public health and safety."

Shortly after passage of Staggers, the ICC issued revised NEPA guidelines.[50] The ICC did not require different levels of environmental review for the three different categories of merger transactions. Rather, the ICC had learned from experience that it is not the size of the railroads or the form of the transaction (stock vs. asset purchase), but the level of expected operational changes that determines the likelihood and potential magnitude of environmental impacts.

Accordingly, the ICC restructured its classification of actions that would normally require an EIS, be addressed in an EA, or be excluded from NEPA

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[49] An early House version of Staggers' merger provision explicitly provided that NEPA "shall not apply to transactions carried out pursuant to [§11324]." H.R. 7235, 96th Cong. §309(a) (May 1, 1980). That language did not appear in either the Conference substitute or the final bill as enacted. *See* Staggers Conf. Rept. at 120-21. *Cf.* Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736, 746 (1979) (providing that NEPA is not applicable to transactions under the statute).

[50] 45 Fed. Reg. 79,810 (Dec. 2, 1980).

reporting requirements.[51] 49 C.F.R. §1108.6 (1981). Only rail line constructions were included in the presumptive-EIS class. All railroad mergers were included in the presumptive-EA class.[52] The ICC required applicants for approval of other actions to report expected operational changes and, if those changes would exceed specified thresholds, to provide additional information on environmental impacts.

The ICC also explained in this rulemaking contemporaneous with Staggers that:

> Measures to mitigate potentially adverse environmental impacts have been suggested in the analyses for some cases in which no environmental significance was found. Notwithstanding future categorical exclusion from the NEPA process, *it will be possible, with respect to each affected class of action*, to develop an environmental record and *to impose conditions to mitigate potentially adverse environmental impacts*.

45 Fed. Reg. at 79,811 (emphasis added).[53]

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[51] The ICC's 1976 revised NEPA guidelines had classified rail line constructions and mergers involving two or more Class I railroads as actions that normally require an EIS. 49 C.F.R. §1108.8 (1976). Other railroad transactions were classified as actions that may present environmental issues but normally do not require an EIS. *Id*. at §1108.9.

[52] Some rail transactions were categorically excluded, such as changes in ownership without changes in operations and applications for common use of rail terminals. *Id*.

[53] In 1990, the ICC again revised its NEPA guidelines but maintained the basic approach of using reporting thresholds generally applicable to all proposed actions. 56 Fed. Reg. 36,104 (July 31, 1991). None of the commenters suggested that more limited procedures should be provided for non-major mergers.

In 1994, Congress directed the ICC to prepare a report that, *inter alia*, identified and analyzed all of its regulatory responsibilities. In that report, the ICC provided a 4-page description of its regulatory responsibility over rail mergers ("consolidations"), which stated: "In all consolidations, the ICC can condition its approval of the transaction."[54] In 1995 Congress abolished the ICC in ICCTA, created the Board to perform many ICC regulatory functions, and left the agency's authority over rail mergers largely unchanged. Congress also did not express any intent to restrict the authority to condition transactions subject to the former §11344(d) – now §11324(d).[55]

Until the mid-1990s, railroad mergers generally did not exceed the agency's NEPA thresholds. Nevertheless, in all transactions (major and non-major), the agency reviewed the environmental data submitted by the applicants, and, in one

[54] *Study of Interstate Commerce Commission Regulatory Responsibilities*, at 8 (October 25, 1994) (*citing* §11344(c)) (included herewith in Addendum).

[55] Section 11344 (1994) was recodified as §11324. Subsection (c) was amended and recodified as §11324(c). As pertinent here, new language was added to the end of the second sentence ("The Commission may impose conditions governing the transaction") as follows: "including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. . . ." Congress added this language simply to "elaborate[] on the existing power to impose conditions on the approval of a merger or other regulated transaction." H. Rep. No. 104-422 at 191 (1995) (ICCTA Conf. Rept.), *as reprinted in* 1995 U.S.C.C.A.N. 850, 876.

case, imposed environmental conditions.[56] Since then, mergers have involved more significant operational changes, and EAs and EISs have been prepared and environmental conditions imposed in both major[57] and other mergers.[58] Until this case, however, no merger applicant had suggested that the Board lacked authority to conduct a NEPA review or impose environmental conditions on a §11324(d) merger.

CN nonetheless asserts (Br. 6-7) that the plain language of §11324(d) shows that Congress eliminated the authority in §11324(c) to impose environmental and other conditions on its merger approvals whenever the Board finds that the transaction would not be anticompetitive.[59] That is not so. Section 11324(d) does not even mention §11324(c), let alone revoke it. Rather, it is silent regarding

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[56] *Rio Grande Indus. – Purchase & Related Trackage Rights – Soo Line R.R.*, 6 I.C.C.2d 854, 899-901 (1990).

[57] *See, e.g.*, *Canadian Nat'l Ry. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122, 175-77 (1999).

[58] *See* cases cited at n.66, *infra*.

[59] CN also argues (Br. 9-10) that a conditioned approval is tantamount to disapproval. While this is theoretically possible, the conditions the Board imposed on CN here are not of that sort, as its closing of the deal pending judicial review shows. In any event, judicial review is available to protect merger applicants from a wrongfully imposed condition, just as it protects them from a wrongfully issued disapproval.

conditions on approval, and merely says that if a merger is not anticompetitive, the Board must approve, as opposed to disapprove, it.[60]

Legislative history further undermines CN's plain language argument. The only relevant legislative history is that of Staggers, which shows that Congress considered exempting *all* rail mergers from NEPA but declined to do so.[61] General expressions of Congress' intent in §11324(d) to narrow the approval standard for mergers that were deemed routine and to reduce their regulatory timeframes (Br. 7-8) do not show an intent to repeal the Board's separate broad conditioning power.[62]

CN's argument amounts to a claim that with §11324(d) Congress implicitly repealed the agency's prior broad authority to condition non-major merger approvals. This claim must be rejected as unsound. Repeals by implication are not

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[60] Contrary to CN's claims (Br. 6-7), the words "shall approve" in §11324(d)(1) by themselves do not negate the agency's express conditioning authority. CN improperly views §11324(d) in isolation, rather than looking at its place within §11324 as a whole. *E.g.*, *Nat'l Rifle Ass'n v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000).

[61] *See* n.49, *supra*. CN claims (Br. 17 n.8) that inferences of legislative intent from unenacted legislation are unreliable. But Justice Scalia's dissent in *Hamdan v. Rumsfeld*, 548 U.S. 557, 668 (2006), cited by CN, observes that this type of legislative history is no more or less reliable than other types. *Cf. Nat'l Rifle Ass'n*, 216 F.3d at 127 (court may examine legislative history in order to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear) (quotation omitted).

[62] *See Approval* 33 (JA ___) (300- and 180-day review periods for §11324(d) transactions are not so short as to reflect a clear Congressional intent to preclude NEPA review and environmental conditions).

favored and "a clearly expressed congressional intention" is required.[63] "An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter act covers the whole subject of the earlier one and is clearly intended as a substitute."[64] As discussed above, neither of these circumstances is present here with respect to the Board's conditioning authority.

CN argues (Br. 12) that, because the first sentence of §11324(c) (containing the "public interest" approval standard) does not apply to §11324(d) transactions, none of §11324(c) applies to §11324(d) transactions. But that reasoning would leave the Board without authority to impose even competition-related conditions on §11324(d) transactions – a result which Congress could not have intended. Indeed, Congress easily could have revised §11324(c) or (d), in or after Staggers, to restrict the Board's conditioning authority to major transactions, or in §11324(d) transactions to labor protection conditions or to competitive conditions. But it did not. Moreover, by later reenacting §11344(c) as §11324(c) in ICCTA, Congress should be deemed to have accepted the Board's view of its conditioning authority,

[63] *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotations omitted).

[64] *Id.* (same).

since all the Committees that had jurisdiction over the agency were specifically informed of the agency's view in the 1994 special report.[65]

Indeed, CN's reading also needlessly creates a tension between §11324(d) and §11326, which expressly requires the Board to impose labor protective conditions in all railroad mergers. CN's position is similarly at odds with its apparent view (Br. 2-3) that the Board may impose whatever voluntary environmental mitigation a railroad proposes. Either the Board has or does not have authority to impose environmental mitigation; CN cannot have it both ways.

The Board reasonably concluded that §11324(d) is not a substitute for all of §11324(c) in non-major mergers, and that there is no irreconcilable conflict between the two with respect to conditioning. Section 11324(d) provides the standard for *approval*, whereas §11324(c) provides the authority to *condition*. The agency has long imposed conditions on its approval of §11324(d) transactions – including ones to which CN was a party – to prevent harm in areas beyond competition, including the environment and public safety.[66]

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[65] *See Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009).

[66] *See Norfolk S. Ry. – Joint Control & Operating/Pooling Agreements – Pan Am S. LLC*, FD-35147 at 23 (STB served Mar. 10, 2009) (*Pan Am S.*) (environmental conditions); *Canadian Pac. Ry. – Control – Dakota, Minn. & E. R.R.*, FD-35081 at 27 (STB served Sept. 30, 2008) (same); *Kansas City S. – Control – The Kan. City S. Ry.*, FD-34342 at 22-23 (STB served Nov. 29, 2004) (safety-related environmental condition); *CN-DMIR* at 20-23 (same); *CN-Wisc. Cent.* at 23-27 (same); *Burlington N. Santa Fe Corp. – Control – Wash. Cent.*, 1 (cont'd…)

CN argues (Br. 10, 13) that even if §11324(c) applies at all to non-major transactions, the Board's power to impose conditions cannot be broader than for approving the merger and, therefore, in §11324(d) transactions only competition-based conditions are allowed. But, while that may be a permissible interpretation of the statute,[67] it is not the only permissible one, especially given the absence of

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S.T.B. 792, 806-08 (1996) (*BN-Wash. Cent.*) (environmental conditions), *aff'd sub nom City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *Rio Grande* 6 I.C.C.2d at 899-901 (same); s*ee also Canadian Nat'l Ry. – Acquisition – Interests of Consol. R. Corp.*, FD-30387, 1984 ICC LEXIS 332 at *31 (ICC served Aug. 29, 1984) (ICC is not precluded from imposing conditions in "minor" transactions, but conditions are not to be used to ameliorate longstanding problems not created by the transaction).

[67] In declining to assess the reasonableness of the purchase price in a post-Staggers "minor" merger – a factor previously part of the "public interest" assessment of such transactions – the ICC stated that it "should not attempt to impose a condition on [its] approval of a transaction related to a matter which [it] could not lawfully consider as a basis for withholding [its] approval" under §11324(d). *Norfolk & Western Ry. – Pur. – Illinois Term. R.R.*, 363 I.C.C. 882, 890-92 (1981) (*Illinois Terminal*), *aff'd sub nom on other grounds*, *State of Illinois*, 687 F.2d at 1048.

However, the agency has never made any such statement in the context of environmental conditions, and the Seventh Circuit's decision affirming *Illinois Terminal* did not address the conditioning authority issue at all. *State of Illinois*, 687 F.2d at 1051. Indeed, in the revision of its environmental regulations contemporaneous with Staggers, the ICC noted that it could impose mitigation conditions in *every* class of agency action. 45 Fed. Reg. at 79811; *see supra*, p. 31. Thus in the 30 years since *Illinois Terminal*, the agency has repeatedly imposed environmental conditions in approving non-major mergers. *See supra*, n.66; *Approval* 31 & n.69 (JA ___). The agency has also imposed conditions in non-major transactions to protect the integrity of its processes, such as requirements that applicants adhere to: (1) pledges and representations made on the record, and (2) terms of negotiated agreements with third parties reached during the agency's

(cont'd…)

any limiting language in §11324(c). Indeed, because Congress specifically considered and rejected exempting railroad mergers from NEPA review, it can fairly be inferred that Congress did not intend to preclude the agency from applying NEPA to its review of all mergers and from using its §11324(c) conditioning authority, where warranted, to impose conditions to mitigate adverse environmental impacts in both major and non-major transactions. This interpretation makes sense, because it is not the size of the railroads that are merging, but the expected operational changes from the merger that determine the likelihood and magnitude of potential environmental impacts. Moreover, that result is fully consistent with the Rail Transportation Policy of "regulating the railroad industry . . . to operate transportation facilities and equipment without detriment to the public health and safety." 49 U.S.C. §10101(8).

The Board's interpretation is particularly sensible considering that, under §11321(a), Board approval exempts merging carriers from "all other law," including state and local environmental laws, "as necessary" to let the carriers carry out the transaction. As the Board explained,[68] the transaction here illustrates the important policy basis for construing the statute to give the Board mitigation

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merger review process. *See, e.g.*, *CN-Wisc. Cent.* at 12-15 (representations); *Pan Am S.* at 17-18 (negotiated agreement). The Board has also imposed oversight conditions. *See, e.g.*, *BN-Wash. Cent.*, 1 S.T.B. at 807.

[68] *Approval* 33-34 (JA ___).

authority in non-major transactions. This transaction will provide nationwide economic benefits by making the interstate rail network more efficient and relieving rail congestion in the Chicago area. But it also will significantly impact communities along the EJ&E line, where, depending on the segment, freight traffic will increase from 4–18 trains a day to 20–42 trains per day.[69] Absent a clear statement to the contrary, it must not be assumed that Congress removed the agency's power to impose reasonable and feasible conditions to mitigate these impacts.[70] In fact, if the seller of the EJ&E had been a Class I railroad, the Board unquestionably could impose environmental mitigation. It makes no sense to have a different result based on the seller's size, when the environmental effects will be the same.

In construing the extent of its conditioning authority, the Board also properly looked to the Congressional instruction in NEPA directing agencies to interpret and administer their statutes, regulations and policies in accordance with the environmental protection policies set forth in NEPA "to the fullest extent

[69] *See* FEIS ES-7 (JA ___).

[70] *See Approval* 33-34 (JA ___). Indeed, Congress intended for the Board's powers to be read broadly, which is why 49 U.S.C. §721(a) provides that "[e]numeration of a power of the Board . . . does not exclude another power the Board may have in carrying out [the Act]."

possible."[71] As the Board observed, where an agency's authority to take a particular action – such as imposing conditions – is grounded in its own statute, NEPA "authorizes the agency to make decisions based on environmental factors not expressly identified in the agency's underlying statute."[72] While NEPA itself does not provide the Board the authority to impose conditions, the Board properly construed its "extraordinarily broad" §11324(c) conditioning power[73] to permit imposition of environmental mitigation based on the results of its NEPA review.

CN's reliance (Br. 7-8, 10) on cases allegedly supporting its view that the Board lacks environmental conditioning authority is misplaced. As the Board explained,[74] those cases do not address the agency's authority to impose environmental conditions in §11324(d) mergers. *State of Illinois* affirmed the ICC's conclusion that the public interest approval standard did not apply to non-

[71] 42 U.S.C. §4332.

[72] *Approval* 32 (JA ___) (*quoting Natural Res. Def. Council v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (*NRDC*) (finding that Clean Water Act, and therefore NEPA, did not authorize EPA to attach conditions to a permit that were unrelated to effluent discharges)). CN's argument, relying on *NRDC*, that NEPA is procedural (Br. 15-17) is irrelevant because, unlike EPA, the Board does not claim that NEPA gave it new authority. All agencies are required to overlay NEPA onto their existing procedures and determine the extent to which their organic statutes require or permit them to consider environmental values in their decisionmaking. The Board here looked to the Congressional direction in §4332(1) of NEPA in deciding that it would be appropriate to exercise its broad §11324(c) conditioning authority to address transaction-related environmental harms.

[73] *Southern Pac. Transp.*, 736 F.2d at 721.

[74] *Approval* 32 n.71 (JA ___).

major mergers because Congress had provided the more specific §11324(d) approval standard. 687 F.2d at 1053. *State of Illinois* does not address whether the agency has authority to impose environmental conditions in such cases after conducting a NEPA review.[75] Moreover, the court recognized that the relationship between what are now §11324(c) and §11324(d) was ambiguous. It stated that it was arriving at a "feasible" interpretation of a statute whose draftsmanship "might have been more artful." 687 F.2d at 1053.

Lamoille Valley also does not hold that the agency exceeded its authority in attaching conditions in a merger. Rather, the Court held that the ICC failed to provide an adequate explanation of why it approved a major merger *unconditionally*. 711 F.2d at 300, 331. Because the transaction at issue was a major merger, the Court did not address the agency's ability to condition a §11324(d) transaction. Nor did it address environmental matters. And the Court's statement in a footnote that the agency's discretion in imposing conditions on a merger was no broader than the "public interest" approval standard in §11344(c) was simply a rejection of the argument that the "just and reasonable" conditions that the agency could impose before 1978 were even broader. *Id*. at 301 n.3 (citing

[75] The Seventh Circuit did not purport to address conditioning. It framed the issue as " the proper interpretation of 49 U.S.C. [§11324], as amended by the Staggers Act, regarding the Commission's refusal to consider public interest factors absent a prior showing of anticompetitive effect." 687 F.2d at 1051.

to legislative history of recodification that "just and reasonable" language was deleted "as redundant" in light of broad "public interest" standard).

Nor do *Village of Palestine v. ICC*, 936 F.2d 1335 (D.C. Cir. 1991), and *Minnesota Commercial Railway – Trackage Rights Exemption – Burlington Northern Railroad*, 8 I.C.C.2d 31 (1991), relied on by CN (Br. 7), purport to address the agency's authority to impose mitigation. Both cases involve the standard for granting exemptions under 49 U.S.C. §10502 from the approval requirements of 49 U.S.C. §11324.

In sum, the Board's interpretation of this "unartfully" drafted statute[76] is a permissible one that is entitled to deference under *Chevron.*[77]

IV. CONDITION 14 WAS A REASONABLE EXERCISE OF THE BOARD'S CONDITIONING AUTHORITY.

CN also argues (Br. 24-32) that, if the Board had discretion to impose environmental conditions, it abused that discretion by imposing Condition 14, which calls for grade separations at the two crossings most severely affected by the transaction and requires CN to bear most of the costs. Communities for their part

[76] *State of Illinois*, 687 F.2d at 1053.

[77] CN's claim (Br. 18) that the Board's interpretation of the statute was not developed with sufficient formality and deliberation to merit deference under *Chevron* lacks substance. CN cannot bootstrap its failure to present its no-authority claim so late in the proceeding that it could not be fully aired into a claim that the agency process was inadequate.

challenge the 2015 deadline in Condition 14 for beginning construction of the grade separations. None of these contentions is persuasive.

A. No Cost-Benefit Analysis Was Required Here.

CN asserts (Br. 24-26) that the Board had to do a cost-benefit analysis before deciding that the adverse impacts on the crossings at Ogden Avenue and Lincoln Highway should be mitigated by grade separations. However, neither NEPA nor CEQ regulations require an agency to conduct a cost-benefit analysis.[78] The only "authority" cited by CN – Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) – is wholly inapplicable. The relevant portion of that order is limited to agency rulemakings, does not apply to independent agencies such as the Board, and may not be relied on by private parties to establish standards for agency action.[79] The Board, moreover, has never used a cost-benefit analysis to impose a grade-separation condition.[80]

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[78] 40 C.F.R. §1502.23 (cost-benefit analysis not required).

[79] 58 Fed. Reg. 51,735-37; *Idaho Mining Ass'n, Inc. v. Browner*, 90 F. Supp.2d 1078, 1102 (D. Idaho 2000).

[80] In the past, while it has noted that a cost-benefit analysis can be a useful tool in making decisions on grade separations, *see Dakota, Minn. & E. R.R. – Construction – Powder River Basin* (*DM&E*), FD-33407 DEIS (STB served Sept. 27, 2000) at G-7 to G-9, the Board has not used a cost-benefit analysis in deciding to impose grade-separation mitigation. *See DM&E* FEIS (STB served Nov. 19, 2001) at 5-2 to -3, 5.2.10, 9.3.10, 12.7.2, 12.9.4 (recommending three grade separations based on the unique circumstances of the locations); *CSX Corp. – Control and Operating Lease/Agreements – Conrail, Inc.* (*Conrail*), FD-33388

(cont'd…)

Nor was a cost-benefit analysis necessary here. In determining that grade-separation mitigation was appropriate for the two crossings, the Board applied FHWA guidelines[81] which state that when one of 11 factors is met, the conditions are considered to be so severe that cost-benefit analysis is unnecessary.[82] CN's cost-benefit calculation (Br. 24-26), derived from a formula in an IDOT manual, is immaterial, because that formula is used to prioritize projects for allocation of limited available funding.[83]

DEIS (STB served Dec. 12, 1997) at 7.1.5 (applying three factors, none of which involved cost-benefit, in imposing grade separations); *San Jacinto Rail Ltd. – Construction Exemption – And The Burlington N. & Santa Fe Ry. – Operation Exemption – Build-Out to the Bayport Loop Near Houston, Harris County, Tex.* (*Bayport Loop*), FD-34079 DEIS (STB served Dec. 6, 2002) at App. F (recommending no grade separations after evaluating each crossing's level of service (LOS) and the FHWA's 11 guidelines used here for considering grade separations).

[81] FHWA, Railroad-Highway Grade Crossing Handbook, (Rev. 2d edition, Aug. 2007) (FHWA Handbook), *available at* http://www.fra.dot.gov/downloads/safety/HRGXHandbook.pdf.

[82] Under the FHWA Handbook, "grade crossings should be considered for grade separation or otherwise eliminated across the railroad right-of-way whenever one or more" of the 11 factors exist. FHWA Handbook 151. The Handbook also sets forth 12 *less severe* factors, stating "[h]ighway-rail grade crossings should be considered for grade separation . . . whenever *the cost of grade separation can be economically justified* . . . and one or more of the following conditions exist. . . ." *Id.* at 151-52 (emphasis added). The Board here applied the 11 *higher* standards, which are so severe that *no* cost-benefit analysis is required, and found that two of the 11 factors would be met at each of the two crossings. *See* DEIS 4.2.2 (JA ___); FEIS 4-5, 4-10 to 4-12 (JA ___).

[83] *See* IDOT, Bureau of Design & Environment Manual 3-2, 7-1, 65-1 (2002 edition) (IDOT Manual), *available at* http://dot.il.gov/desenv/bdemanual.html.

As for priorities, CN suggests (Br. 28) that the Board is usurping IDOT's role in prioritizing grade separations.[84] Neither IDOT nor any other Illinois agency has complained of any usurpation. Moreover, if IDOT decides that these two grade separations are not a priority, it need not commit its share of the funds. IDOT, however, to date, has given every indication that it intends to proceed.[85]

B. The Factors Relied On By the Board for Grade Separations Were Appropriate.

CN claims (Br. 26-28) that the Board departed from its past practice of calling for a grade separation only where the LOS[86] at a crossing fell to an E or F

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[84] CN's claim (Br. 28 n.23) that there are 122 at-grade crossings in Illinois and 4 in Indiana that also satisfy the FHWA guidelines used here is irrelevant to the Board's analysis. There are approximately 14,000 public at-grade crossings in the two states. Illinois Commerce Comm'n, Crossing Safety Improvement Program: FY-2011-2015 Plan 1 (April 2010), *available at* http://www.icc.illinois.gov/railroad/CrossingSafetyImprovement.aspx (follow "Crossing Safety Improvement Program FY 2011-2015" hyperlink); Indiana Dep't of Transp., Railroad Grade Crossings: Indiana 2007 Rail-Highway Crossing Inventory, http://www.in.gov/indot/2949.htm. The vehicle delay and exposure criteria therefore identify the worst 1% of all crossings. That Illinois and Indiana do not have the funds to grade-separate many problematic crossings does not mean that the Board should authorize CN to create such severe impacts without paying for its "share" of the problem created by the merger.

[85] *See Canadian Nat'l Ry. Co. – Control EJ&E W. Co.*, FD-35087 (STB served Oct. 23, 2009) (*Decision 21*) at 4-6 (JA ___) and discussion at p. 53-54 *infra*.

[86] LOS refers to the efficiency at which a roadway, intersection, or highway/rail at-grade crossing operates, using a grading system where LOS A indicates free-flowing traffic and LOS F indicates extreme congestion. DEIS 3.3-3.

and created a new standard without explanation. CN is incorrect. First, this claim ignores the fact that the Board has never held that grade separation is appropriate only in cases where the LOS drops to an E or F. Rather, LOS is simply one of several factors used by the Board to determine if a grade separation is warranted.[87] Indeed, in another case, the Board applied LOS and other factors (the 11 FHWA factors used here), to evaluate the need for grade separations.[88]

Second, the Board explained why it used more than LOS. As the Board stated,[89] many locations along the EJ&E line are important to regional mobility,[90] which is not a factor in every proceeding. Therefore, in its transportation analysis of grade crossings, the Board also used total vehicle delay[91] and queue length,[92]

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[87] *See Approval* 43 & n.95 (JA ___); s*ee also Conrail* DEIS at 7.1.5, App. C-15 (utilizing LOS and two other factors); *Bayport Loop* DEIS at 4.4, App. F.1, F.2 (using LOS and the 11 FHWA factors); *DM&E* DEIS at App. G.3 (using LOS and individual delay to identify substantially impacted crossings); *DM&E* FEIS at 5-2 to 5-3, 5.2.10, 9.3.10 (recommending grade separations based on the locations' unique circumstances).

[88] *Bayport Loop* DEIS at 4.4, App. F.2

[89] *Approval* 43 n.95 (JA ___); FEIS 2-32 (JA ___).

[90] Mobility is defined as the "ease of moving people and goods within a transportation network. . . . [and specifically] the ability of the people in a community to move easily from place to place on the local roadway network, which includes the ability to cross active rail lines." DEIS 3.3-26 (JA ___).

[91] Total vehicle delay measures whether the crossing would experience more than 40 hours of total combined vehicle delay in a 24-hour period (2,400 minutes per day), based on average daily traffic volumes (ADT). FEIS 2-32 (JA ___). The total vehicle delay in this case would be 4,377 minutes per day for the Ogden

(cont'd…)

because, unlike LOS, those two factors take into account mobility within the community or region.[93] That analysis identified 13 crossings for which the Board considered mitigation.[94]

In considering mitigation measures, the Board also used the FHWA Handbook's 11 guidelines, which CN concedes (Br. 27) are recognized screening tools for determining whether, under a safety analysis, a grade separation should be considered.[95] Under the guidelines, if only one is met, a grade separation should be considered. Here the Board found Ogden Avenue and Lincoln Highway: (1) met

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Avenue crossing, and 3,034 minutes per day for the Lincoln Highway crossing. FEIS 2.5.4 (JA ___).

[92] Queue length, the number of vehicles stopped at a crossing while a train passes, determines whether the queue blocks a major thoroughfare. DEIS 3.3-26 (JA ___); FEIS 2-32 (JA ___).

[93] *Approval* 43 n.95 (JA ___); FEIS 2-32 (JA ___). Mobility factors are not applicable in all cases. For example, in more rural locales where highway/highway and highway/rail crossings are not closely spaced, the length of the queue may not be as important, because there would not be any other major thoroughfare for the queue to block.

[94] *Approval* 43-44 (JA ___); FEIS 2.5.4 (JA ___).

[95] FHWA Handbook, 151. The Handbook was developed by the Technical Working Group (TWG) established by the U.S. Department of Transportation and led by representatives from FHWA, Federal Railroad Administration (FRA), Federal Transit Administration, and National Highway Traffic Safety Administration, in collaboration with the Institute of Transportation Engineers. FHWA Handbook i, 145.

(or neared) two of the 11 factors (total vehicle delay and vehicle exposure);[96] (2) were designated by IDOT as Strategic Regional Arterials (a measure of their significance to regional mobility); (3) had the highest projected 2015 ADT of all crossings (Ogden Avenue's was 45,828 and Lincoln Highway's was 39,656); (4) already had signals in place; and (5) had no alternative grade-separated route available.[97] Moreover, the Ogden Avenue crossing was less than 1 mile north of Montgomery Avenue, the only other crossing where the vehicle exposure level would also exceed 1 million. Thus, this grade separation would help reduce safety concerns at Montgomery Avenue.[98] Also, the projected queue length at the Lincoln Highway crossing would block Sauk Trail, a major thoroughfare.[99]

In short, all of the factors relied upon were reasonable and appropriate.

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[96] DEIS 4.2.2.4 (JA ___); FEIS 4.2.3.1 (JA ___) (the two factors were: (1) vehicle exposure (the product of the number of trains per day multiplied by the number of vehicles per day) exceeding one million, which Ogden Avenue exceeded and Lincoln Highway neared at 999,905; and (2) vehicle delay exceeding 40 vehicle hours per day, which both met). While several other crossings met one of the factors, grade separations were not recommended for those crossings. *See* FEIS 4.2.3.1 (JA ___).

[97] *Approval* 44-45 (JA ___); *see* FEIS 4.2.3.1 (JA ___); DEIS 4.3.1.3 (JA ___).

[98] FEIS 4-5 (JA ___).

[99] FEIS 2-41 (JA ___).

C. The Board's Cost Allocation Reasonably Correlated To Transaction-Related Impacts.

The Board has a longstanding, consistent policy of requiring applicants to mitigate transaction-related impacts, which the Board reasonably applied here, based on the extent to which the transaction would cause the need for grade separation.[100] CN fails to support its argument (Br. 29) that these allocations lacked rational explanation.

The Board reasonably declined to allocate costs according to what CN calls "federal and state policy" (Br. 29-31),[101] which is inapplicable here. As the Board explained,[102] the 5% limitation on the railroad's contribution to the cost of crossing-safety improvements applies only to state-initiated projects financed with Federal-Aid Highway Program (Program) funds.[103] To the extent CN claims (Br.

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[100] *Approval* 45-48 (JA ___).

[101] 23 U.S.C. §130; 23 C.F.R. §646.210(b); IDOT Manual 7-1; *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 82-83 (1964) (noting the federal and state allocation of costs for crossing improvements and stating merely that the consensus was the public should bear a majority of the costs because it is the principal beneficiary of such protection).

[102] *Approval* 46 (JA ___).

[103] As part of the Program, Congress makes a limited amount of federal funds available to the states to finance the cost of crossing-safety improvements. When a grade-separation is financed with Program funds, the railroad's share is capped at 5%, on the theory that the primary beneficiary is the public, and contrary state laws are preempted. *See* 23 U.S.C. §130; 23 C.F.R. §646.210(b); IDOT

(cont'd…)

29) the Board's allocation conflicts with Illinois state law or policy, it cites nothing more than the IDOT Manual, which is the state's prioritization tool for highway projects and, not surprisingly, follows the Program policies since that is an important source of funding.[104] As CN admits (Br. 29), these crossings will not be financed with Program funds.

Further, the Board recognized that the Program assumes that the railroad receives little or no benefit from a separation.[105] Here, however, CN is receiving "the substantial benefit of the Board's approval of this transaction, which will change the character of the EJ&E line from a line serving local traffic . . . into a line that will be integrated into CN's North American rail network at the very heart of the system."[106]

For grade-separation projects outside the Program, courts have repeatedly rejected railroad arguments that states must allocate the costs of grade separations solely on the basis of who benefits from the grade separation. As the Supreme Court explained in *Atchison, Topeka & Santa Fe Railroad v. Public Utilities*

Manual at 7-1 (5% cap on railroad's contribution to grade separations funded by the Program).

[104] IDOT Manual 3-2(5); 7-1.01; 65-1.

[105] *Approval* 46 (JA ___).

[106] *Id*.

Commission, 346 U.S. 346, 352-53 (1953) (upholding a 50% cost allocation of grade-separation to a railroad):[107]

> It was not an arbitrary exercise of power by the Commission to refuse to allocate costs on the basis of benefits alone. The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.

Thus, CN's argument (Br. 29-32) that it will not realize the primary benefit of the grade separation misses the key issue: the extent to which the transaction creates the need for the separation, not just how much CN benefits.[108] The need for grade separations here was created by CN's proposal, which it cannot carry out without Board approval.[109]

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[107] *Accord Iowa, Chi. & E. R.R. v. Wash. County*, 384 F.3d 557, 562 (8th Cir. 2004) (state may require a railroad to pay the cost of grade separations made necessary by increased highway traffic if the allocation is reasonable); *Southern Ry. v. City of Morristown*, 448 F.2d 288, 290 (6th Cir. 1971) (state permitted to allocate to railroad 100% of costs of crossing safety signals).

[108] *Approval* 47 (JA ___). This is not analogous to a situation where a carrier adds trains to its own existing line, as CN suggests (Br. 31). This line was also changing ownership, for which federal regulatory approval was needed, and the projected operational changes would be significant. *See Approval* 9-10 (JA ___).

[109] CN's contention (Br. 30) implies that, since the right-of-way is pre-existing, it should not be allocated any costs higher than 5%. But the Supreme Court has rejected that logic: "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also (cont'd…)

To determine CN's required share, the Board reasonably followed its policy of requiring applicants to mitigate transaction-related impacts, but not pre-existing conditions.[110] The Board calculated the share of future increased vehicle delay and exposure projected at each intersection attributable to the transaction, and assigned to CN that share of the grade-separation cost: 67% at Ogden Avenue and 78.5% at Lincoln Highway.[111]

Finally, CN argues (Br. 32) that the Board's decision will discourage efficient and beneficial transactions. But it was the Board's judgment that the environmental impacts that would result from the merger needed to be mitigated, and the measures it chose are reasonable. There is no basis for the Court to substitute its judgment for the Board's.

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to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." *Erie R.R. v. Bd. of Pub.Util. Comm'rs*, 254 U.S. 394, 409 (1921) (internal quotations omitted).

[110] *Approval* 47 (JA ___). *See Dakota, Minn. & E. R.R. – Construction – Powder River Basin*, 6 S.T.B. 8, 79-83 (2002) (same); *CSX Corp. – Control and Operating Leases/Agreements – Conrail, Inc.*, 3 S.T.B. 196, 587 (1998) (imposing grade-separation mitigation). In *Conrail*, the Board stated that, "[b]ecause of the significant impact of Acquisition-related actions on traffic delay . . . the CSX share of the costs for design and construction of the grade separation should be substantially more than the traditional railroad share for similar projects," 3 S.T.B. at 587, and instructed the parties to continue negotiations and, if unsuccessful, submit to binding arbitration or mediation.

[111] *Approval* 46-47 (JA ___) (explaining that the Board did not follow either cost-allocation approach suggested in the FEIS, because neither properly correlated costs to impacts).

D. Communities' Challenge to the 2015 Time Limit is Premature.

The Board did not require CN to remain obligated indefinitely for its share of the grade-separation costs. Condition 14 provides that, if the remaining funds are not committed and construction initiated by 2015, CN will be released from its financial responsibility.

Communities complain (Br. 52-54) that the State may not be able to meet the 2015 deadline. IDOT brought this concern to the Board in a petition to extend that date, which the Board addressed in *Decision 21*, served October 23, 2009. The Board observed that preliminary steps toward construction were already being taken, and it found no basis to believe that construction could not be initiated in time.[112] In addition, it clarified that "if reasonable progress has been made, yet it becomes clear that construction is not likely to be initiated by 2015 due to circumstances beyond IDOT's control, such as a long appeals process, the Board [would] entertain requests to extend the time deadlines . . ." at that time.[113]

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[112] *Decision 21* at 6 (JA ___). *See also Canadian Nat'l Ry. Co. – Control EJ&E W. Co.*, FD-35087 at 7 (STB served Aug. 5, 2009) (*Decision 19*) (denying a petition for reconsideration of the timeline filed by the Illinois Commerce Commission, because (1) the required oversight and reporting would keep the Board apprised of construction progress, and (2) the 2015 date was within the Commission's own recommended 5-10 year timeframe for grade-separation projects).

[113] *Decision 21* at 5-6 (JA ___).

Just as the Board properly denied IDOT's petition as premature, so too should this Court reject Communities' argument here. Communities cannot show that they are aggrieved by a deadline that is more than five years into the future; they cannot yet know what the situation may be then, and the Board has already stated that it will entertain a reasonable petition to reopen based on changed circumstances.[114]

V. THE BOARD SATISFIED ITS NEPA RESPONSIBILITIES AND IMPOSED REASONABLE MITIGATION.

Communities challenge the Board's environmental review and decision not to impose certain mitigation conditions they requested. As we will show, Communities' arguments are unpersuasive.

A. The Board's Consideration of Alternatives Satisfied NEPA.

The Board was required in the EIS to evaluate in detail "reasonable" alternatives and to "briefly discuss" its decision to eliminate other possible alternatives from detailed study.[115] The Board did so. It examined in detail three alternatives for the federal action sought (Board action on CN's application to acquire EJ&E): (1) granting the application as filed, (2) granting it with conditions, and (3) the "no action" alternative (the status quo).

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[114] *See* 49 U.S.C. §722(c).

[115] 40 C.F.R. §1502.14(a).

An alternative is not reasonable if it does not fulfill the federal action's objectives,[116] or is not feasible.[117] Here, the Board identified four other possible alternatives suggested by various parties – granting CN expanded trackage rights to use another carrier's rail line[s], implementing the Chicago Regional Environmental and Transportation Efficiency program (CREATE) (a public-private partnership to improve rail infrastructure in northern Illinois), assembling a patchwork of existing lines around Chicago, or constructing a new rail line outside the EJ&E arc – and explained that it was not studying any of them in detail because they were not feasible and otherwise did not meet objectives of the federal action. [118]

Communities do not challenge the Board's conclusion that detailed analysis of those four alternatives was not warranted. Instead, they argue that the Board failed to study other alternatives because it improperly restricted the purpose and need for the project to that of the applicants. However, the only other alternatives Communities suggest (Br. 21) – approval of the application with traffic caps on CN's lines or other operational limitations – were considered, in response to

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[116] *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (*Busey*).

[117] *Vermont Yankee*, 435 U.S. at 551.

[118] *See* DEIS 2.5 (JA ___); FEIS 3.4.3.8 to 3.4.3.11 (JA ___); *Approval* 9-10, 37 & n.80 (JA ___); *Decision 18* at 6 (JA ___).

comments, as part of the discussion of the "approval with conditions" alternative. The Board declined to impose such operational conditions, because railroads must "have the flexibility to operate using their most efficient routings so as to meet the needs of their shippers."[119] The Board explained that it "does not traditionally impose operating restrictions," such as traffic or rail yard operation limitations, on railroads.[120]

Moreover, the statement of purpose and need was appropriate. Where a project involves an application by a private party for a license or approval (and not an action proposed by the government), this Court has consistently held that the agency may accept the applicant's stated goals.[121] It is true that, where a private party's application involves use of federal land or federal financing, the reviewing agency may have separate interests that inform the statement of purpose and

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[119] FEIS 3.4-85 (JA ___). *See also* FEIS 3.4-89 (JA ___).

[120] FEIS 3.4-110 (JA ___). *See also* FEIS 3.3-33 (JA ___) ("It is not the Board's practice to insert itself into the day-to-day operations of railroads").

[121] *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1332 (D.C. Cir. 2004); *City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (agency's alternatives analysis should be based around applicant's goals, including applicant's economic goals); *Busey*, 938 F.2d at 199. *See also City of Shoreacres v. Waterworth*, 420 F.3d 440, 450-51 (5th Cir. 2005) (agency must only consider alternatives relevant to goals of applicant and "is not to define what those goals should be"); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982) (EPA's choice of alternative sites for oil refinery and deep water port was "focused by the primary objectives of the permit applicant").

need.[122] But the Board has no such separate interest in this rail acquisition. Nor is the Board a planning agency with a Congressional mandate to restructure rail operations in and around Chicago. Thus, the Board properly accepted the applicant's purpose and need as the basis for identifying reasonable alternatives.

CEQ's 1983 guidance[123] is not to the contrary, although Communities suggest otherwise (Br. 19 n.53). CEQ concluded that there was no need to develop a separate standard for determining the range of alternatives to be evaluated in licensing and permitting situations because the existing "reasonable alternatives" standard of 40 C.F.R. §1502.14 was flexible enough to cover all situations. Notably, under that standard, "[t]here is no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives."[124]

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[122] Except for *Busey*, which upheld the FAA's acceptance of the goals of an airport authority for a proposed air cargo hub as its own, the cases cited by Communities on "purpose and need" are inapposite, because they involved a federal agency as either project proponent/funder or as landowner. *Nat'l Parks Conservation Ass'n v. BLM*, – F.3d –, 2010 WL 1980717 at *2 (9th Cir. May 19, 2010) (land exchange); *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (FHWA funding of highway/bridge construction project); *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012 (10th Cir. 2002) (development on federal land); *Alexandria*, 198 F.3d at 864 (FHWA construction of Wilson Bridge); *Colorado Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (same).

[123] Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 (July 28, 1983).

[124] *Id.* at 34,267.

In sum, the STB thoroughly studied a reasonable range of alternatives and explained why others were not reasonable. Communities have not demonstrated that any additional alternatives merited review.[125]

B. The Board Properly Considered the Potential Harms and Benefits in the EIS.

Communities incorrectly assert (Br. 28-32) that the Board's approval of the transaction was predicated on the allegedly faulty assumption that the known harms to areas along the EJ&E line would be offset in an equivalent way by benefits to areas along the existing CN lines in Chicago. Neither the EIS nor the Board's decision stated that the environmental benefits would directly offset or be "equivalent" to the environmental harms. Nor was there any need for such a finding. NEPA only requires agencies to take a "hard look" at the environmental consequences of a proposed action, including preparing a detailed statement of any

[125] *Vermont Yankee*, 435 U.S. at 549-555; *City of Bridgeton v. Slater*, 212 F.3d 448, 458-459 (8th Cir. 2000); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 576-577 (9th Cir. 1998). Communities' reliance (Br. 22 n.64) on *Davis*, 302 F.3d at 1121-22, for the proposition that the Board must study alternatives "that may meet the purpose and need if considered cumulatively" is misplaced. A highway project with multiple components and several readily separable objectives was at issue in *Davis*. *Id.* at 1118-19. Here, in contrast, the objectives of the transaction were interrelated aspects of the functioning of an integrated rail network. In addition, the Court's alternatives discussion was based in part upon the requirement in section 4(f) of the Department of Transportation Act (49 U.S.C. §303(c)) that a "project include[ ] all possible planning to minimize harm" to publicly owned lands. *Davis*, 302 F.3d at 1121-22. Section 4(f) does not apply to the Board, which is an independent agency.

adverse effects that cannot be avoided.[126] An agency need not study benefits in an *equivalent way* or deny requested action if potential adverse impacts will not be fully offset by environmental benefits.[127] Analyzing the existing CN lines with reduced rail traffic with the same level of detail as the EJ&E line with increased rail traffic would have needlessly complicated and prolonged the EIS process.

The EIS satisfied NEPA by extensively discussing the environmental harms of the transaction. Chapter 3 of the DEIS detailed the affected environment, and Chapters 4 and 5 set forth the environmental consequences and indirect and cumulative impacts. After extensive supplemental analysis and review of comments, the FEIS recommended over 200 mitigation measures to address, to the extent feasible, potential harms, which the Board adopted and supplemented in *Approval*.[128]

The EIS also addressed environmental benefits.[129] The benefits to communities on CN's existing lines in Chicago were logically based upon the

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[126] *Robertson*, 490 U.S. at 350-51; 42 U.S.C. §4332(2)(C).

[127] *Robertson*, 490 U.S. at 351 (agency may decide that other factors outweigh harms, even if significant).

[128] *See* FEIS Chap. 4 (JA ___); *Approval* App. A (JA ___).

[129] *See* DEIS 4.2-1 to 4.2-2, 4.2.5.7, 4.7.6, 4.10-1, 4.11-2 to 4.11-4, Tables 4.2-20, 4.3-6, 4.3-7 (JA ___); FEIS ES-20 (JA ___).

anticipated reduction in rail traffic on those lines.[130] The Board specifically recognized that these benefits would not necessarily be permanent.[131]

The Board also recognized that, even with the mitigation it was imposing, "the transaction may have adverse environmental effects that cannot be fully mitigated."[132] Nonetheless, the Board was satisfied that these adverse effects would be "outweighed by the many *transportation and* environmental impact benefits that approval of this transaction would bring about."[133] As the Board explained, because Chicago is the nation's largest rail hub and one-third of the nation's freight rail traffic goes to, from, or through it, reducing that congestion will have "wide-ranging beneficial impacts on the movement of freight throughout the country."[134] No specific quantification was required. Communities have not shown that the Board's analysis of environmental impacts failed to satisfy NEPA.

C. The Board Adequately Evaluated Direct, Indirect, and Cumulative Effects.

Communities next assert (Br. 32-33) that the Board ignored the fact that the transaction would "increase overall freight capacity throughout northern Illinois"

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[130] *See* DEIS 2.2.1, 4.1-39, App. B (finding CN's operating plan was reasonable) (JA ___).

[131] FEIS ES-20 (JA ___); *Approval* 35, 42 (JA ___).

[132] *Approval* 53 (JA ___).

[133] *Approval* 37 (emphasis added) (JA ___).

[134] *Id.*

and failed to fully analyze the direct and indirect effects of increased freight traffic. Communities do not specify in their brief whether they are complaining about the geographic scope, time frame, or some other aspect of the Board's methodology for projecting transaction-related train traffic increases. Nor did any party present a specific challenge involving train traffic projections for the "northern Illinois" region in their comments on the DEIS. Communities have thus not properly presented this issue for review. [135]

In any event, a transportation agency's capacity and demand forecasting are entitled to a high degree of deference.[136] The Board reasonably determined that all transaction-related train traffic changes would occur in the Chicago metropolitan area (northeast Illinois and northwest Indiana).[137] The Board also reasonably decided to study effects on the Chicago metropolitan area through 2015, explaining that attempting to assess impacts beyond 2015 would be speculative.[138] The Board

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[135] *See Nevada*, 457 F.3d at 88 (failure to raise issue in NEPA comments results in waiver). The Board did receive comments requesting that it study cumulative impacts regionally, FEIS 3.4-369 (JA ___), and study the effects of increased freight traffic in Wisconsin, Final Scope at 14 (JA ___), but explained that these impacts would not be reasonably foreseeable.

[136] *St. John's United Church of Christ v. FAA*, 550 F.3d 1168, 1172 (D.C. Cir. 2008); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 272 (D.C. Cir. 2002).

[137] DEIS 1.4, 3.1-1, 5.2.2 (JA ___); FEIS 3.4-363 to 3.4-365 (JA ___). As part of its analysis, the EIS discussed the regional rail systems. *See* DEIS 2.1.1, 3.1.1 (JA___); FEIS 3.4.4.1 (JA ___).

[138] *See* FEIS 3.4-364 (JA ___); DEIS 2.2.1.2, 2.2.1.5 (JA ___).

found that CN's traffic projections were "consistent with SEA's own extensive analysis," and required CN to notify it, in the quarterly reports, of any substantial departure from the traffic levels on which *Approval* was based, so that it could take appropriate action if warranted.[139]

The Board conducted a thorough analysis of the direct effects of the proposed action, analyzed whether they would lead to indirect effects, and discussed the indirect effects of project-related freight traffic growth in the Chicago metropolitan area.[140] NEPA requires nothing more.

Communities also argue briefly (Br. 33-34) that the Board's analysis of cumulative impacts (impacts that are "added to other past, present, and reasonably foreseeable future actions")[141] was inadequate. This argument must be rejected because Communities fail to specify any potential cumulative impacts that were overlooked.[142] Moreover, the identification of cumulative impacts is committed "to the special competency" of the agency preparing an EIS.[143]

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[139] *Approval* 42, 84 (JA ___); *see* DEIS 2.2.1.2, App. B (JA ___) (evaluating traffic levels).

[140] FEIS 3.4.15.1, 3.4.15.2 (JA ___); DEIS 5.2, 5.3 (JA ___).

[141] 40 C.F.R. §1508.7. The EIS addressed cumulative impacts, identifying and studying 9 projects. *See* DEIS 5.2, 5.4-5.6 (JA ___); FEIS 2.3.1.4, 2.13, 3.3.1.8 (JA ___). The FEIS explained that, with mitigation, some natural resources could "result in positive cumulative effects. . . ." FEIS 3.3-54 (JA ___).

[142] *See TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006); *City of Los Angeles v. NHTSA*, 912 F.2d 478, 488 (D.C. Cir. 1990), *overruled on other*

(cont'd…)

Communities do reference the Environmental Protection Agency (EPA) comment that the cumulative impacts analysis was inadequate. However, EPA's only specific concern was with possible cumulative impacts on a wetland in Wayne, Illinois (DuPage County) from the Pratt's Wayne Woods Mining and Reclamation Project and a second wetland in Gary, Indiana from the Gary/Chicago International Airport Runway Extension.[144] The Board carefully examined both of these projects and found no cumulative impacts on the wetlands from either.[145]

D. The Board Adequately Discussed Potential Mitigation Measures and Its Choices Were Reasonable.

Communities next argue (Br. 34-50) that the Board inadequately explored measures to avoid, minimize, or compensate for environmental harms. They suggest (Br. 35-36) that two of the three Board members found the mitigation inadequate. In fact, however, the Board unanimously approved the transaction as conditioned, and the separate expressions were comments, not partial dissents. *Approval* 55-57.

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grounds, *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996); *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980).

[143] *Kleppe*, 427 U.S. at 413.

[144] *See* EI-16281 at 5 (JA ___); EI-16282 at 1-2 (JA ___).

[145] *See* DEIS 5.5.4, 5.5.5 (JA ___) (finding no cumulative impacts from Pratt Wayne's Woods or Gary Airport projects); FEIS 3.3.3.15 (JA ___) (responding to EPA's cumulative impacts concerns); *Decision 19* at 9-11 (JA ___) (finding EPA's post-decision letter did not show that the wetlands analysis was inadequate).

Communities argue generally (Br. 36-37) that the Board relied too much on voluntary mitigation. But voluntary mitigation often can be more effective, and sometimes more far-reaching, than mitigation the Board could impose unilaterally. Therefore, the Board encourages voluntary agreements, and its practice is to require compliance with them in lieu of local or site-specific mitigation that it would otherwise impose.[146] CN's voluntary mitigation was extensive, and the Board enhanced and supplemented it, where necessary, with 74 other measures.[147]

Communities also discount as "redundant" or "toothless" (Br. 37-39) mitigation measures that require compliance with other laws, regulations, or best management practices. But the Board routinely and properly imposes such measures as conditions so that it can enforce them along with other entities. Moreover, such conditions are only a small portion of the extensive mitigation imposed here.

Communities' complaints about specific mitigation measures are similarly unpersuasive. As explained below, for each specific harm Communities complain about, the Board evaluated mitigation options, where appropriate, in the EIS, and reasonably chose different options than what Communities preferred. NEPA does

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[146] To date, CN has reached agreements with 22 of 33 affected communities.

[147] *See Approval* 38-39 & n.83 (JA ___); *see, e.g.*, FEIS 4.1.2, 4.2.2.6, 4.2.2.7, 4.2.3.2, 4.2.6, 4.2.9 to 4.2.12 (JA ___).

not mandate particular outcomes.[148] Indeed, the Board was not required to mitigate adverse effects, even if significant, so long as it adequately studied potential steps to minimize them and rationally explained its decision.[149]

Barrington Grade Crossings (Br. 40-42). Condition 18 requires CN to install a closed-circuit television system covering four grade crossings for the benefit of two emergency service providers in Barrington. While Communities seek to portray this measure as ineffective, the Board reasonably concluded that the system will allow dispatchers to specify pre-planned alternative routes around blocked crossings or to dispatch services from an alternate facility.[150]

Communities argue that the Board instead should have required a grade separation in Barrington. The Board considered that, but the record did not support a separation there, as the total delay time would increase by only 4%-5% during peak periods.[151] Communities suggest that existing conditions in Barrington

[148] *Busey*, 938 F.2d at 194.

[149] *See Robertson*, 490 U.S. at 351-353.

[150] *Approval* 49 (JA ___); FEIS 4.2.3.2 (JA ___).

[151] *Approval* 45 & n.101 (JA ___); DEIS 4.3-3 to 4.3-11, 6-17 to 6-21 (JA ___); FEIS 2-39, 2.5.9, 4-7 to 4-14, App. A.5 (JA ___) (Barrington's additional analysis, including traffic-flow model).

warrant a grade separation. But there is no basis to hold CN responsible for the inadequacy of the pre-existing roadway system.[152]

Increased Wildlife Collisions (Br. 42-44). Communities assert that the Board did not do enough to mitigate harm to wildlife from train collisions. But after evaluating the potential effects on area wildlife, the Board found that animal populations would not be adversely affected.[153] Therefore, it properly declined to impose specific wildlife mitigation, although it did require CN to designate a local resource agency liaison and document the liaison's progress.[154]

Increased Threat of Hazmat Spills (Br. 44-50). Contrary to the Communities' characterizations, the Board was hardly "blithe" or "cavalier" in its analysis of increased hazardous materials transportation over the EJ&E line; nor did it "ignore" or "shrug off" mitigation proposals. The EIS extensively evaluated hazardous material transportation, including the number of carloads, the probability of release, the frequency of release, and the overall potential risk, as well as existing regulations governing the transportation of hazardous materials[155]

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[152] *See Approval* 44-45, n.98 (JA ___) (noting communities could negotiate with CN for appropriate roadway modifications).

[153] *See* DEIS 4.11.3, App. M (JA ___); FEIS 3.3.1.3, App. A.9 at 12-36 (JA ___).

[154] *See Approval* 51-52, 79 (JA ___).

[155] Under the Hazardous Materials Transportation Act, 49 U.S.C. §5101 *et seq.*, the Department of Transportation (DOT) has promulgated extensive

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and FRA safety statistics and historical data.[156] The analysis showed a low likelihood of a release resulting from this transaction at any particular location.[157] Yet, the Board imposed hazardous materials mitigation.[158]

Communities argue that additional measures should have been imposed, including containment systems and re-routing of hazardous material shipments. They rely on comments of EPA and the Department of the Interior (DOI) that the Board should consider containment systems near sensitive water bodies. This Court has explained, however, that "a lead agency does not have to follow [another federal agency's] comments slavishly—it just has to take them seriously." *Busey*,

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regulations governing transportation of hazardous materials, including tank car specifications. *See Union Pac. R.R.—Petition for Declaratory Order*, FD-35219 at 5-6, n.22 (STB served June 11, 2009) (noting extensive regulations of DOT and Transportation Security Administration governing transport of hazardous materials); *see also CSX Transp., Inc. v. Williams*, 406 F.3d 667, 674 (D.C. Cir. 2005) (federal regulation of hazardous materials transportation generally preempts state or local law).

[156] *See* DEIS 3.2.3.3, 3.2.3.4, 4.2.5, App. C (detailing the method, assumptions, equations, and information used), 4.11.3.1 (evaluating the exposure of plant communities, wildlife, and natural areas to hazardous material spills), 4.12.3.1 (evaluating the risk of hazardous material spills on groundwater and surface water supplies) (JA ___); FEIS 2.7 (JA ___) (conducting extensive additional analysis, including on water resources, based on DEIS comments).

[157] DEIS 4.2-36 to 4.2-38 (JA ___); FEIS 2.7.4 (JA ___).

[158] *Approval* 61-62, 75 (JA ___).

938 F.2d at 201 (citation omitted).[159] The Board carefully considered the EPA and DOI suggestions here.[160] The Board explained that attempting to perform an analysis of a potential spill would be too speculative (without knowing the specific hazardous material, specific location, and specific weather conditions of a release) and that it saw no need to recommend particular containment systems under these circumstances.[161]

A community commenter proposed rerouting hazardous materials from the EJ&E line. The Board, however, pointed to regulations of the Pipeline and Hazardous Materials Safety Administration, which require railroads to undertake a route analysis and select "the practicable route posing the least overall safety and security risk." 49 C.F.R. §172.820(e).[162] Further, the Board explained that the transaction's rerouting of trains to the EJ&E lines would reduce the number of

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[159] *Accord Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1038 (10th Cir. 2001); *Akiak Native Cmty. v. U.S. Postal Service*, 213 F.3d 1140, 1146-47 (9th Cir. 2000); *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991).

[160] FEIS 3.3.1, 3.3.3 (JA ___). The Board also responded to EPA's post-approval letter comments in *Decision 19*, explaining that no need for further mitigation was shown. *Decision 19* at 9-10 (JA ___).

[161] FEIS 2.7.2, 3.3-16 to 3.3-17, 3.3-43 to 3.3-44 (JA ___); *Approval* 50 (JA ___).

[162] *Approval* 50 n.104 (JA ___).

individuals exposed to potential risk, given the higher population densities on the CN lines through Chicago.[163]

The Board reasonably concluded that existing hazardous materials regulations — along with existing spill prevention and emergency response programs, and the voluntary and other hazardous material mitigation imposed — would adequately address commenters' concerns.[164]

E. The Board's Third-Party Contracting Process Was Appropriate.

Given the expertise needed to conduct thorough environmental analyses, it would be impractical and prohibitively expensive for the Board to employ the various experts needed for its environmental reviews.[165] Third-party contracting, which is specifically permitted by CEQ and Board regulations,[166] is a voluntary arrangement in which the applicant pays for a contractor to assist the Board in preparing environmental analyses, but the contractor works under SEA's exclusive direction, supervision, and control. This process has been applied and worked well

[163] FEIS 2-67, 3.4-141 (JA ___).

[164] *Approval* 50, 61-62, 75 (JA ___); *Decision 19* at 9 (JA ___); FEIS 2.7, 3.3-16 to 3.3-19, 3.3.3.2 (JA ___).

[165] *Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation*, 5 S.T.B. 467, 475 (2001) (*Policy Statement*).

[166] 40 C.F.R. §1506.5(c); 49 C.F.R. §§1105.10(d), 1105.4(j).

in more than 70 agency proceedings.[167] Contrary to Communities' suggestion (Br. 23-26), the Board properly selected and adequately supervised the third-party contractor in this case, HDR Inc.

1. The Selection Process

CEQ regulations require that: (1) the third-party contractor must be selected by the agency; (2) the contractor must execute a disclosure statement prepared by the agency "specifying that [the contractor has] no financial or other interest in the outcome of the project;" and (3) the agency must provide guidance, participate in the EIS preparation, evaluate the EIS prior to approval, and take responsibility for its scope and contents.[168] The Board adhered to these requirements here.

SEA maintains a list of pre-approved contractors.[169] CN met with SEA before filing its Application, discussed possible contractors, and then in writing requested SEA's approval of HDR as the contractor.[170] Upon review, SEA gave its

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[167] *See Policy Statement* at 469 (noting over 50 agency proceedings as of 2001).

[168] 40 C.F.R. §1506.5(c).

[169] The list of contractors is at http://www.stb.dot.gov/SEAContactList.nsf/ByCompanyName?OpenPage. To develop the list, SEA vets contractors, who must submit qualification statements regarding their expertise and staff resumes.

[170] EI-3215 (JA ___). This case is nothing like *Busey*, relied on by Communities (Br. 23-24), where the applicant selected the third-party contractor and the contractor never executed the disclosure form. 938 F.2d at 202.

written approval, conditioned on HDR signing the proper financial disclosure statement,[171] which HDR promptly did.[172]

SEA then prepared a Memorandum of Understanding (MOU) that SEA, CN, and HDR all signed, setting forth each party's responsibilities.[173] The MOU stated, among other things, that "the Board, through [SEA] has selected and [CN] has agreed to engage, at [CN's] expense, [HDR] as the Independent Third Party Contractor."[174] The MOU reiterated the conflict-of-interest restrictions on HDR and its subcontractors.[175] In short, SEA's process properly allowed the applicant to have some input into the selection, by allowing CN to identify a possible contractor from SEA's preapproved list, but SEA retained ultimate responsibility for the final selection. This process is consistent with CEQ policy.[176]

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[171] EO-701 (JA ___).

[172] EI-3218 (JA ___).

[173] EO-757 (JA ___).

[174] *Id.* at 1 (JA ___). *See also* FEIS 3.4-69 (JA ___) (stating that SEA's "preparation of the DEIS was supported by [HDR], a third-party contractor selected by SEA").

[175] *See* EO-757 at 3-4 (JA ___) ("[n]o employee of [HDR] . . . shall engage in (a) other work for [CN], or (b) any work, relating to the Application, for any other party. . . ").

[176] *See Forty Questions*, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981), Question 16 ("the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c)"). EPA follows similar procedures,

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2. Supervision

Because the contractor was properly selected, the Court need not reach the question of proper oversight.[177] In any event, Communities fail to cast doubt on SEA's careful, continuous oversight of HDR.

The MOU explicitly states each party's role and responsibilities.[178] CN's primary responsibility here was to pay the contractor's costs – which it has done.[179] SEA's role was to direct, review, and approve preparation of the environmental documentation; monitor HDR's progress; take responsibility for determining the environmentally preferable alternative and mitigation measures; prepare recommendations; and in all other respects direct, evaluate, oversee, and approve the environmental review.[180] SEA also had authority to terminate the contractor for cause.[181]

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selecting a contractor "in consultation with the applicant. . . ." 40 C.F.R. §6.303(a).

[177] *See AWARE v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) (whether there was sufficient agency oversight reached only where there was "an alleged conflict of interest that [was] known to the agency").

[178] EO-757 at 5-13 (JA ___).

[179] *Id.* at 9-10 (JA ___).

[180] *Id.* at 2, 11-13 (JA ___).

[181] *Id.* at 15-16 (JA ___).

HDR's role was to provide appropriate expertise; analyze environmental impacts; draft environmental documentation; and attend meetings with SEA.[182] HDR was required to submit its work directly to SEA for review; follow SEA's instructions; and provide SEA access to review all procedures and data.[183] HDR was expressly prohibited from disclosing the results of its work to anyone, including CN, without SEA's express authorization; nor was HDR, under any circumstances, to allow CN to modify or edit HDR's work before submission to SEA.[184]

The record reflects SEA's monitoring, direction, control, and oversight of HDR. The FEIS stated that, "[f]or this project . . . contractor's scope of work, approach, and activities are administered under SEA's supervision, direction, and control. Personnel from HDR [] work as an extension of SEA's staff. . . ."[185] The FEIS also stated that "[a]ll information provided by [CN] was reviewed and verified by SEA before being used in the [DEIS]. . . . HDR functioned as an

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[182] *Id.* at 5-9 (JA ___).

[183] *Id.* at 6-8 (JA ___). Subcontractors also had to work under SEA's direction, control, and supervision. *Id.* at 5 (JA ___).

[184] *Id.* at 7 (JA ___).

[185] FEIS 1-10 (JA ___). *See also* FEIS 5-1 (JA _) ("SEA supervises the third-party contractors' scope of work, approach, and activities . . . [and] SEA's oversight of the third-party contractors' work is exclusive and extensive").

extension of SEA staff and worked under SEA's direction to collect and verify environmental information from CN."[186]

When requesting information from CN, SEA's letters asked that both SEA and HDR be sent the information.[187] And HDR and SEA jointly attended open houses and public meetings on the transaction.[188] Also, in numerous letters to other entities and government officials, SEA referred to an HDR employee as "the Board's representative."[189] In other letters requesting meetings with agencies, SEA noted that an individual from HDR would contact the agency on SEA's behalf.[190]

Communities present no evidence to show that the process set out in the MOU, the FEIS, and the correspondence was not followed. Accordingly, they fail to support their request for a remand. *See Busey*, 958 F.2d at 202 (remand is necessary only where there is evidence that the "objectivity and integrity of the [NEPA] process" has been compromised).

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[186] FEIS 3.4-69 (JA ___).

[187] EO-847 (JA ___); EO-860 (JA ___); EO-861 (JA ___); EO-926 (JA ___).

[188] DEIS 9-20 (JA ___); FEIS 5-9 (JA ___).

[189] *See, e.g.*, EO-852 through EO-856 (JA ___); EO-862 through EO-886 (JA ___); EO-888 through EO-895 (JA ___).

[190] EO-887 (JA ___); EO-903 (JA ___); EO-904 (JA ___).

CONCLUSION

The Court should find that CN's statutory interpretation argument is waived. In all other respects, the Board's decision should be affirmed.

Respectfully submitted,

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June 22, 2010

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of the Court's order in this proceeding filed June 8, 2010 because this brief contains 17,751 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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Dated: June 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2010, I electronically filed the foregoing Joint Brief of Respondents brief with the Clerk of the Court using the CM/ECF System, which will send the notice of such filing to registered CM/ECF users. In addition, copies were served by email on all counsel listed below

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ADDENDUM

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Effective: October 16, 2008

United States Code Annotated Currentness
Title 23. Highways (Refs & Annos)
Chapter 1. Federal-Aid Highways (Refs & Annos)
§ 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.--Each State shall conduct and systematically maintain a survey of all

highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.--

(1) In general.--Before making an apportionment under section 104(b)(5) for a fiscal year, the Secretary shall set aside, from amounts made available to carry out the highway safety improvement program under section 148 for such fiscal year, at least $220,000,000 for the elimination of hazards and the installation of protective devices at railway-highway crossings. At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(2) Special rule.--If a State demonstrates to the satisfaction of the Secretary that the State has met all its needs for installation of protective devices at railway-highway crossings, the State may use funds made available by this section for other highway safety improvement program purposes.

(f) Apportionment.--

(1) Formula.--Fifty percent of the funds set aside to carry out this section pursuant to subsection (e)(1) shall be apportioned to the States in accordance with the formula set forth in section 104(b)(3)(A), and 50 percent of such funds shall be apportioned to the States in the ratio that total public railway-highway crossings in each State bears to the total of such crossings in all States.

(2) Minimum apportionment.--Notwithstanding paragraph (1), each State shall receive a minimum of one-half of 1 percent of the funds apportioned under paragraph (1).

(3) Federal share.--The Federal share payable on account of any project financed with funds set aside to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.--Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works and the Committee on Commerce, Science, and Transportation, of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives, not later than April 1, 2006, and every 2 years thereafter,, [FN1] on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by sub-

section (d) and include recommendations for future implementation of the railroad highway [FN2] crossings program.

(h) Use of funds for matching.--Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.--

(1) In general.--Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.--A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.--The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of--

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.--A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.--In carrying out projects under this section, a State shall take into account bicycle safety.

(k) Expenditure of funds.--Not more than 2 percent of funds apportioned to a State to carry out this section may be used by the State for compilation and analysis of data in support of activities carried out under subsection (g).

(l) National crossing inventory.--

(1) Initial reporting of crossing information.--Not later than 1 year after the date of enactment of the Rail Safety Improvement Act of 2008 or within 6 months of a new crossing becoming operational, whichever oc-

curs later, each State shall report to the Secretary of Transportation current information, including information about warning devices and signage, as specified by the Secretary, concerning each previously unreported public crossing located within its borders.

(2) Periodic updating of crossing information.--On a periodic basis beginning not later than 2 years after the date of enactment of the Rail Safety Improvement Act of 2008 and on or before September 30 of every year thereafter, or as otherwise specified by the Secretary, each State shall report to the Secretary current information, including information about warning devices and signage, as specified by the Secretary, concerning each public crossing located within its borders.

(3) Rulemaking authority.--The Secretary shall prescribe the regulations necessary to implement this subsection. The Secretary may enforce each provision of the Department of Transportation's statement of the national highway-rail crossing inventory policy, procedures, and instructions for States and railroads that is in effect on the date of enactment of the Rail Safety Improvement Act of 2008, until such provision is superseded by a regulation issued under this subsection.

(4) Definitions.--In this subsection--

(A) "public crossing" means a location within a State, other than a location where one or more railroad tracks cross one or more railroad tracks either at grade or grade-separated, where--

(i) a public highway, road, or street, including associated sidewalks and pathways, crosses one or more railroad tracks either at grade or grade-separated; or

(ii) a publicly owned pathway explicitly authorized by a public authority or a railroad carrier and dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, or street, or a private roadway, crosses one or more railroad tracks either at grade or grade-separated; and

(B) "State" means a State of the United States, the District of Columbia, or Puerto Rico.

CREDIT(S)

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178. Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193; Pub.L. 109-59, Title I, § 1401(c), formerly § 1401(d), Aug. 10, 2005, 119 Stat. 1226; Pub.L. 110-244, Title I, § 101(l), (s)(1), June 6, 2008, 122 Stat. 1575, 1577; Pub.L. 110-432, Div. A, Title II, § 204(c), Oct. 16, 2008, 122 Stat. 4871.)

[FN1] So in original.

[FN2] So in original. Probably should be "railroad-highway".

2008 Acts. Amendments by Pub.L. 110-244, effective June 6, 2008, except that amendments made by Pub.L. 110-244 (other than amendments by Pub.L. 110-244, §§ 101(g), 101(m)(1)(H), 103, 105, 109, and 201(o) to 23 U.S.C.A. § 144, 23 U.S.C.A. § 101 note, and 49 U.S.C.A. § 5338 note), to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L. 109-59, 119 Stat. 1144, effective as of Aug. 10, 2005, and treated as being included in that Act as of Aug. 10, 2005, and each provision of Pub.L. 109-59, as in effect on the day before the date of enactment of Pub.L. 110-244, which was approved June 6, 2008, that is amended by Pub.L. 110-244, (other than amendments by Pub.L. 110-244, §§ 101(g), 101(m)(1)(H), 103, 105, 109, and 201(o) to 23 U.S.C.A. § 144, 23 U.S.C.A. § 101 note, and 49 U.S.C.A. § 5338 note) shall be treated as not being enacted, see Pub.L. 110-244, § 121, set out as a note under 23 U.S.C.A. § 101.

Current through P.L. 111-176 (excluding P.L. 111-148, 111-152, 111-159, 111-173, and 111-175) approved 6-8-10

END OF DOCUMENT

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(I) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdictionby law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

49 U.S.C. § 5(2) (1970)

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TITLE 43—PUBLIC LANDS
TO
TITLE 49—TRANSPORTATION

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rier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this chapter, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

(2) Competition of railroads with water routes; change of rates.

Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. (Feb. 4, 1887, ch. 104, pt. I, § 4, 24 Stat. 380; June 18, 1910, ch. 309, § 8, 36 Stat. 547; Feb. 28, 1920, ch. 91, § 406, 41 Stat. 480; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 6 (a), 54 Stat. 904; July 11, 1957, Pub. L. 85–99, 71 Stat. 292; Sept. 27, 1962, Pub. L. 87–707, 76 Stat. 635.)

REFERENCES IN TEXT

This Act, referred to in par. (1), means the Interstate Commerce Act, which is classified to this chapter and chapters 8, 12, 13 and 19 of this title.

AMENDMENTS

1962—Pub. L. 87–707 provided for exemption of express companies.

1957—Par. (1). Pub. L. 85–99, inserted proviso allowing carriers operating over circuitous routes to meet the charges of carriers of the same type operating over more direct routes.

1940—Par. (1). Act Sept. 18, 1940, amended par. (1)

1935—Act Aug. 9, 1935, substituted "this part" for "this Act" in the original Interstate Commerce Act.

EXISTING RATES, ETC., AS AFFECTED BY ACT SEPT. 18, 1940

Section 6 (b) of act Sept. 18, 1940, provided that:

"In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended [par. 1 of this section], no rate, fare, or charge lawfully in effect at the time of the enactment of this act shall be required to be changed by reason of the amendments made to such paragraph [par. 1 of this section] by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application."

§ 5. Combinations and consolidations of carriers.

(1) Pooling; division of traffic, service, or earnings.

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

49 U.S.C. § 5(3) (1977)

§ 5, par. (3). Expedited merger, consolidation, etc., procedure, applicability; prerequisites

(a) If a merger, consolidation, unification or coordination project (as described in section 1654(c) of this title), joint use of tracks or other facilities, or acquisition or sale of assets, which involves any common carrier by railroad subject to this chapter, is proposed by an eligible party in accordance with subdivision (b) during the period beginning on February 5, 1976, and ending on December 31, 1981, the party seeking authority for the execution or implementation of such transaction may utilize the procedure set forth in this paragraph or in paragraph (2) of this section.

(b) Any transaction described in subdivision (a) may be proposed to the Commission by—

(i) the Secretary of Transportation (hereafter in this paragraph referred to as the "Secretary"), with the consent of the common carriers by railroad subject to this chapter which are parties to such transaction; or

(ii) any such carrier which, not less than 6 months prior to such submission to the Commission, submitted such proposed transaction to the Secretary for evaluation pursuant to subdivision (f).

(c) Whenever a transaction described in subdivision (a) is proposed under this paragraph, the proposing party shall submit an application for approval thereof to the Commission, in accordance with such requirements as to form, content, and documentation as the Commission may prescribe. Within 10 days after the date of receipt of such an application, the Commission shall send a notice of such proposed transaction to—

(i) the Governor of each State which may be affected, directly or indirectly, by such transaction if it is executed or implemented;

(ii) the Attorney General;

(iii) The Secretary of Labor; and

(iv) the Secretary (except where the Secretary is the proposing party).

The Commission shall accompany its notice to the Secretary with a request for the report of the Secretary pursuant to clause (v) of subdivision (f). Each such notice shall include a copy of such application; a summary of the proposed transaction involved, and the proposing party's reasons and public interest justifications therefor.

(d) The Commission shall hold a public hearing on each application submitted to it pursuant to subdivision (c), within 90 days after the date of receipt of such application. Such public hearing shall be held before a panel of the Commission duly designated for such purpose by the Commission. Such panel may utilize administrative law judges and the Rail Services Planning Office in such manner as it considers appropriate for the conduct of the hearing, the evaluation of such application

and comments thereon, and the timely and reasonable determination of whether it is in the public interest to grant such application and to approve such proposed transaction pursuant to subdivision (g). Such panel shall complete such hearing within 180 days after the date of referral of such application to such panel, and it may, in order to meet such requirement, prescribe such rules and make such rulings as may tend to avoid unnecessary costs or delay. Such panel shall recommend a decision and certify the record to the full Commission for final decision, within 90 days after the termination of such hearing. The full Commission shall hear oral argument on the matter so certified, and it shall render a final decision within 120 days after receipt of the certified record and recommended decision of such panel. The Commission may, in its discretion, extend any time period set forth in this subdivision, except that the final decision of the Commission shall be rendered not later than the second anniversary of the date of receipt of such an application by the Commission.

(e) In making its recommended decision with respect to any transaction proposed under this paragraph, the duly designated panel of the Commission shall—

(i) request the views of the Secretary, with respect to the effect of such proposed transaction on the national transportation policy, as stated by the Secretary, and consider the matter submitted under subdivision (f);

(ii) request the views of the Attorney General, with respect to any competitive or anticompetitive effects of such proposed transaction; and

(iii) request the views of the Secretary of Labor, with respect to the effect of such proposed transaction on railroad employees, particularly as to whether such proposal contains adequate employee protection provisions.

Such views shall be submitted in writing and shall be available to the public upon request.

(f) Whenever a proposed transaction is submitted to the Secretary by a common carrier by railroad pursuant to clause (ii) of subdivision (b), and whenever the Secretary develops a proposed transaction for submission to the Commission pursuant to subdivision (c), the Secretary shall—

(i) publish a summary and a detailed account of the contents of such proposed transaction in the Federal Register, in order to provide reasonable notice to interested parties and the public of such proposed transaction;

(ii) give notice of such proposed transaction to the Attorney General and to the Governor of each State in which any part of the properties of the common carriers by railroad involved in such proposed transaction are situated;

(iii) conduct an informal public hearing with respect to such proposed transaction and provide an opportunity for all interested parties to submit written comments;

(iv) study each such proposed transaction with respect to—

(A) the needs of rail transportation in the geographical area affected;

(B) the effect of such proposed transaction on the retention and promotion of competition in the provision of rail and other transportation services in the geographical area affected;

(C) the environmental impact of such proposed transaction and of alternative choices of action;

(D) the effect of such proposed transaction on employment;

(E) the cost of rehabilitation and modernization of track, equipment, and other facilities, with a comparison of the

potential savings or losses from other possible choices of action;

(F) the rationalization of the rail system;

(G) the impact of such proposed transaction on shippers, consumers, and railroad employees;

(H) the effect of such proposed transaction on the communities in the geographical areas affected and on the geographical areas contiguous to such areas; and

(I) whether such proposed transaction will improve rail service; and

(v) submit a report to the Commission setting forth the results of each study conducted pursuant to clause (iv), within 10 days after an application is submitted to the Commission pursuant to subdivision (c), with respect to the proposed transaction which is the subject of such study. The Commission shall give due weight and consideration to such report in making its determinations under this paragraph.

(g) The Commission may—

(i) approve a transaction proposed under this paragraph, if the Commission determines that such proposed transaction is in the public interest; and

(ii) condition its approval of any such proposed transaction on any terms, conditions, and modifications which the Commission determines are in the public interest; or

(iii) disapprove any such proposed transaction, if the Commission determines that such proposed transaction is not in the public interest.

In each such case, the decision of the Commission shall be accompanied by a written opinion setting forth the reasons for its action.

As amended Feb. 5, 1976, Pub.L. 94–210, Title IV, § 403(a), 90 Stat. 63.

1976 Amendment. Pub.L. 94–210 added par. (3). Former par. (3) redesignated (4).

Legislative History. For legislative history and purpose of Pub.L. 94–210, see 1976 U.S.Code Cong. and Adm.News, p. 14.

49 U.S.C. § 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) **Approval of programs and projects.**—Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De minimis impacts.—

(1) Requirements.—

(A) Requirements for historic sites.—The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, n in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.—The requirements of subsection (c)(1)shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria.—In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) **Historic sites.**—With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges.—With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

49 U.S.C. § 721. Powers

(a) In general.--The Board shall carry out this chapter and subtitle IV. Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV. The Board may prescribe regulations in carrying out this chapter and subtitle IV.

(b) Inquiries, reports, and orders.--The Board may--

(1) inquire into and report on the management of the business of carriers providing transportation and services subject to subtitle IV;

(2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers to the extent that the business of that person is related to the management of the business of that carrier;

(3) obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV; and

(4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.

(c) Subpoena witnesses.—

(1) The Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States, to the designated place of the proceeding. If a witness disobeys a subpoena, the Board, or a party to a proceeding before the Board, may petition a court of the United States to enforce that subpoena.

(2) The district courts of the United States have jurisdiction to enforce a subpoena issued under this section. Trial is in the district in which the proceeding is conducted. The court may punish a refusal to obey a subpoena as a contempt of court.

(d) Depositions.—

(1) In a proceeding, the Board may take the testimony of a witness by deposition and may order the witness to produce records. A party to a proceeding pending before the Board may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding is at issue on petition and answer

(2) If a witness fails to be deposed or to produce records under paragraph (1), the Board may subpoena the witness to take a deposition, produce the records, or both.

(3) A deposition may be taken before a judge of a court of the United States, a United States magistrate judge, a clerk of a district court, or a chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any State, or a notary public who is not counsel or attorney of a party or interested in the proceeding.

(4) Before taking a deposition, reasonable notice must be given in writing by the party or the attorney of that party proposing to take a deposition to the opposing party or the attorney of record of that party, whoever is nearest. The notice shall state the name of the witness and the time and place of taking the deposition.

(5) The testimony of a person deposed under this subsection shall be taken under oath. The person taking the deposition shall prepare, or cause to be prepared, a transcript of the testimony taken. The transcript shall be subscribed by the deponent.

(6) The testimony of a witness who is in a foreign country may be taken by deposition before an officer or person designated by the Board or agreed on by the parties by written stipulation filed with the Board. A deposition shall be filed with the Board promptly.

(e) Witness fees.--Each witness summoned before the Board or whose deposition is taken under this section and the individual taking the deposition are entitled to the same fees and mileage paid for those services in the courts of the United States.

49 U.S.C. § 722. Board action

(a) Effective date of actions. Unless otherwise provided in subtitle IV, the Board may determine, within a reasonable time, when its actions, other than an action ordering the payment of money, take effect.

(b) Terminating and changing actions. An action of the Board remains in effect under its own terms or until superseded. The Board may change, suspend, or set aside any such action on notice. Notice may be given in a manner determined by the Board. A court of competent jurisdiction may suspend or set aside any such action.

(c) Reconsidering actions. The Board may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances--

(1) reopen a proceeding;

(2) grant rehearing, reargument, or reconsideration of an action of the Board; or

(3) change an action of the Board.

An interested party may petition to reopen and reconsider an action of the Board under this subsection under regulations of the Board.

(d) Finality of actions. Notwithstanding subtitle IV, an action of the Board under this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

49 U.S.C. § 10101(a) (1982)

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VOLUME EIGHTEEN

TITLE 46—SHIPPING
TO
TITLE 49—TRANSPORTATION

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of a strong national economy and a strong national defense;

"(2) that the best means of assuring such a system is through competition and reduced regulation;

"(3) that maximum flexibility on the part of the carriers in the pricing of their services best serves the shippers of household goods and allows a variety of quality and price options to meet market demands; and

"(4) that the interest of individual shippers can be best protected by allowing carriers of household goods maximum flexibility in serving the needs of their shippers, by providing accurate and complete information concerning carriers' performance and individual shippers' rights and remedies, by reducing the amount of unnecessary regulations, and by strengthening remedies for violations of those regulations that are necessary for protection of individual shippers.

"(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 5 years following the date of enactment of this Act [Oct. 15, 1980], to ensure that this Act [see Short Title of 1980 Amendment note set out above] is being implemented according to congressional intent and purpose."

Section 3 of Pub. L. 96-296 provided that:

"(a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980's; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; that protective regulation has resulted in some operating inefficiencies and some anticompetitive pricing; that in order to reduce the uncertainty felt by the Nation's transportation industry, the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act [Feb. 4, 1887, ch. 104, 24 Stat. 379, which was repealed and is covered by this subtitle] and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

"(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 5 years following the date of enactment of this Act [July 1, 1980], to ensure that this Act [see Short Title of 1980 Amendment note set out above] is being implemented according to congressional intent and purpose."

REDUCTION IN UNNECESSARY REGULATION

Section 2 of Pub. L. 97-261 provided that: "This Act [see Short Title of 1982 Amendment note above] is part of the continuing effort by Congress to reduce unnecessary and burdensome Government regulation."

Section 2 of Pub. L. 96-296 provided that: "This Act [see Short Title of 1980 Amendment note set out above] is part of the continuing effort by Congress to reduce unnecessary regulation by the Federal Government."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 302, 10321, 10525, 10526, 10544, 10702, 10704, 10706, 10708, 10721, 10761, 10762, 10766, 10922, 10923, 10924, 10930, 10933, 10935, 11108, 11343, 11501 of this title; section 1653 of Appendix to this title; title 33 section 1803.

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

(Added Pub. L. 96-448, title I, § 101(a), Oct. 14, 1980, 94 Stat. 1897.)

EFFECTIVE DATE

Section effective Oct. 1, 1980, see section 710(a) of Pub. L. 96-448, set out as an Effective Date of 1980 *Amendment note under section 10101 of this title.*

CONGRESSIONAL DECLARATION OF FINDINGS

Section 2 of Pub. L. 96-448 provided that: "The Congress hereby finds that—

"(1) historically, railroads were the essential factor in the national transportation system;

"(2) the enactment of the Interstate Commerce Act [Feb. 4, 1887, ch. 104, 24 Stat. 379, which was repealed and is covered by this subtitle] was essential to prevent an abuse of monopoly power by railroads and to establish and maintain a national railroad network;

"(3) today, most transportation within the United States is competitive;

"(4) many of the Government regulations affecting railroads have become unnecessary and inefficient;

"(5) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;

"(6) earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;

"(7) by 1985, there will be a capital shortfall within the railroad industry of between $16,000,000,000 and $20,000,000,000;

"(8) failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy; and

"(9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation."

STATEMENT OF PURPOSE AND GOALS

Section 3 of Pub. L. 96-448 provided that: "The purpose of this Act [see Short Title of 1980 Amendment note set out under section 10101 of this title] is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—

"(1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;

"(2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;

"(3) to assist the rail system to remain viable in the private sector of the economy;

"(4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and

"(5) to assist in the rehabilitation and financing of the rail system."

49 U.S.C. § 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

49 U.S.C. § 10501. General jurisdiction

(a) (1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is–

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in–

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over–

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c) (1) In this subsection–

(A) the term "local governmental authority"–

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over–

(A) mass transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to–

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

49 U.S.C. § 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers

from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

49 U.S.C. § 10906. Exception

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

49 U.S.C. § 11321. Scope of authority

(a) The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

49 U.S.C. § 11323. Consolidation, merger, and acquisition of control

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board:

(1) Consolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) A purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.

(3) Acquisition of control of a rail carrier by any number of rail carriers.

(4) Acquisition of control of at least 2 rail carriers by a person that is not a rail carrier.

(5) Acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers.

(6) Acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those rail carriers, regardless of how that result is reached, only with the approval and authorization of the Board under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a rail carrier that has the effect of putting that rail carrier and person affiliated with it, taken together, in control of another rail carrier.

(2) A transaction by a person affiliated with a rail carrier that has the effect of putting that rail carrier and persons affiliated with it, taken together, in control of another rail carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a rail carrier or is affiliated with a rail carrier) that has the effect of putting those persons and rail carriers and persons affiliated with any of them, or with any of those affiliated rail carriers, taken together, in control of another rail carrier.

(c) A person is affiliated with a rail carrier under this subchapter if, because of the relationship between that person and a rail carrier, it is reasonable to believe that the affairs of another rail carrier, control of which may be acquired by that person, will be managed in the interest of the other rail carrier.

49 U.S.C. § 11324. Consolidation, merger, and acquisition of control: conditions of approval

(a) The Board may begin a proceeding to approve and authorize a transaction referred to in section 11323 of this title on application of the person seeking that authority. When an application is filed with the Board, the Board shall notify the chief executive officer of each State in which property of the rail carriers involved in the proposed transaction is located and shall notify those rail carriers. The Board shall hold a public hearing unless the Board determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section which involves the merger or control of at least two Class I railroads, as defined by the Board, the Board shall consider at least--

(1) the effect of the proposed transaction on the adequacy of transportation to the public;

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(3) the total fixed charges that result from the proposed transaction;

(4) the interest of rail carrier employees affected by the proposed transaction; and

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

(c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Board may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. The Board may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Board finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall

approve such an application unless it finds that--

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Board shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Attorney General.

(e) No transaction described in section 11326(b) may have the effect of avoiding a collective bargaining agreement or shifting work from a rail carrier with a collective bargaining agreement to a rail carrier without a collective bargaining agreement.

(f)(1) To the extent provided in this subsection, a proceeding under this subchapter relating to a transaction involving at least one Class I rail carrier shall not be considered an adjudication required by statute to be determined on the record after opportunity for an agency hearing, for the purposes of subchapter II of chapter 5 of title 5, United States Code.

(2) Ex parte communications, as defined in section 551(14) of title 5, United States Code, shall be permitted in proceedings described in paragraph (1) of this subsection, subject to the requirements of paragraph (3) of this subsection.

(3)(A) Any member or employee of the Board who makes or receives a written ex parte communication concerning the merits of a proceeding described in paragraph (1) shall promptly place the communication in the public docket of the proceeding.

(B) Any member or employee of the Board who makes or receives an oral ex parte communication concerning the merits of a proceeding described in paragraph (1) shall promptly place a written summary of the oral communication in the public docket of the proceeding.

(4) Nothing in this subsection shall be construed to require the Board or any of its members or employees to engage in any ex parte communication with any person. Nothing in this subsection or any other law shall be construed to limit the authority of the members or employees of the Board, in their discretion, to note in the docket or otherwise publicly the occurrence and substance of an ex parte communication.

49 U.S.C. § 11325. Consolidation, merger, and acquisition of control: procedure

(a) The Board shall publish notice of the application under section 11324 [49 USCS § 11324] in the Federal Register by the end of the 30th day after the application is filed with the Board. However, if the application is incomplete, the Board shall reject it by the end of that period. The order of rejection is a final action of the Board. The published notice shall indicate whether the application involves--

(1) the merger or control of at least two Class I railroads, as defined by the Board, to be decided within the time limits specified in subsection (b) of this section;

(2) transactions of regional or national transportation significance, to be decided within the time limits specified in subsection (c) of this section; or

(3) any other transaction covered by this section, to be decided within the time limits specified in subsection (d) of this section.

(b) If the application involves the merger or control of two or more Class I railroads, as defined by the Board, the following conditions apply:

(1) Written comments about an application may be filed with the Board within 45 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Attorney General and the Secretary of Transportation, who may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Board by the end of the 15th day after the date of receipt of the written comments.

(2) The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 90th day after publication of notice under that subsection.

(3) The Board must conclude evidentiary proceedings by the end of 1 year after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

(c) If the application involves a transaction other than the merger or control of at least two Class I railroads, as defined by the Board, which the Board has determined to be of regional or national transportation significance, the following conditions apply:

(1) Written comments about an application, including comments of the Attorney General and the Secretary of Transportation, may be filed with the Board within 30 days after notice of the application is published under subsection (a) of this section.

(2) The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 60th day after publication of notice under that subsection.

(3) The Board must conclude any evidentiary proceedings by the 180th day after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

(d) For all applications under this section other than those specified in subsections (b) and (c) of this section, the following conditions apply:
(1) Written comments about an application, including comments of the Attorney General and the Secretary of Transportation, may be filed with the Board within 30 days after notice of the application is published under subsection (a) of this section.

(2) The Board must conclude any evidentiary proceedings by the 105th day after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 45th day after the date on which it concludes the evidentiary proceedings.

49 U.S.C. § 11326. Employee protective arrangements in transactions involving rail carriers

(a) Except as otherwise provided in this section, when approval is sought for a transaction under sections 11324 and 11325 of this title, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) of this title. Notwithstanding this part, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Board (or if an employee was employed for a lesser period of time by the rail carrier before the action became effective, for that lesser period).

(b) When approval is sought under sections 11324 and 11325 for a transaction involving one Class II and one or more Class III rail carriers, there shall be an arrangement as required under subsection (a) of this section, except that such arrangement shall be limited to one year of severance pay, which shall not exceed the amount of earnings from the railroad employment of that employee during the 12-month period immediately preceding the date on which the application for approval of such transaction is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of that employee with the acquiring carrier during the 12-month period immediately following the effective date of the transaction. The parties may agree to terms other than as provided in this subsection.

(c) When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers, this section shall not apply.

49 U.S.C. § 11343 (1978)
49 U.S.C. § 11344 (1978
49 U.S.C. § 11345 (1978)

UNITED STATES CODE

1976 EDITION

SUPPLEMENT II

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE UNITED STATES, ENACTED DURING THE 95TH CONGRESS

Prepared and published under authority of Title 2, U.S. Code, Section 285b by the Office of the Law Revision Counsel of the House of Representatives

JANUARY 4, 1977, TO JANUARY 14, 1979

VOLUME THREE

TITLE 45—RAILROADS

TO

TITLE 50—WAR AND NATIONAL DEFENSE

POPULAR NAMES, TABLES AND INDEX

§ 11342. Limitation on pooling and division of transportation or earnings

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or III of chapter 105 of this title may not agree or combine with another of those carriers to pool or divide traffic or services or any part of their earnings without the approval of the Commission under this section or sections 11124 and 11125 of this title. The Commission may approve and authorize the agreement or combination if the carriers involved assent to the pooling or division and the Commission finds that a pooling or division of traffic, services, or earnings—

(1) will be in the interest of better service to the public or of economy of operation; and

(2) will not unreasonably restrain competition.

(b) The Commission may impose conditions governing the pooling or division and may approve and authorize payment of a reasonable consideration between the carriers.

(c) This section affects an agreement or combination filed with the Commission before March 19, 1941, to which a water common carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title is a party only when the Commission determines that the agreement or combination does not meet the requirements for approval and authorization under subsection (a) of this section.

(d) The Commission may begin a proceeding under this section on its own initiative or on application.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1434.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
11342.....	49:5(1) (less words between semicolon and 1st colon).	Feb. 4, 1887, ch. 104, § 5(1) (less words between semicolon and 1st colon), 24 Stat. 380; Feb. 28, 1920, ch. 91, § 407, 41 Stat. 480; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; restated Sept. 18, 1940, ch. 722, § 7, 54 Stat. 905.

In subsection (a), the words "subchapter I, II, or III of chapter 105 of this title" are substituted for "this chapter, chapter 8, or chapter 12 of this title" to conform to the revised title. The words "upon specific approval by order of the Commission" are omitted as unnecessary in view of the restatement and subchapter II of chapter 5 of title 5. The words "under this section or sections 11124 and 11125 of this title" are substituted for "as in this section provided, and except as provided in paragraph (16) of section 1 of this title" to conform to the revision of 49:1(16) and 5. The words "may not agree or combine" are substituted for "it shall be unlawful . . . to enter into any contract, agreement, or combination" for clarity and as being more inclusive. The words "gross or net" are omitted as unnecessary in view of subchapter II of chapter 5 of title 5. The words "*Provided*, That" are omitted as surplus. The words "the Commission finds" are substituted for "whenever the Commission is of opinion" for clarity. The word "unreasonably" is substituted for "unduly" for clarity.

In subsection (b), the words "The Commission may impose conditions governing the pooling or division" are substituted for "to the extent indicated by the Commission . . . under such rules and regulations, . . . and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises" for clarity and consistency in view of subchapter II of chapter 5 of title 5. The words "may approve and authorize payment of a reasonable consideration between the carriers" are substituted for "and for such consideration as between such carriers" for clarity.

In subsection (c), the words "*Provided further*, That" are omitted as surplus. The words "This section affects an agreement or combination filed with the Commission before March 19, 1941 only" are substituted for "any contract, agreement, or combination . . . relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful" for clarity and to eliminate obsolete language. The words "when the Commission determines that the agreement or combination does not meet the requirements for approval and authorization under subsection (a) of this section" are substituted for "except to the extent that the Commission . . . may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition" for clarity and consistency.

In subsection (d), the word "proceeding" is substituted for "hearing" for consistency in view of subchapter II of chapter 103 of the revised title and subchapter II of chapter 5 of title 5.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 11914 of this title.

§ 11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use

of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $300,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1434.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
11343(a).....	49:5(2)(a), (14).	Feb. 4, 1887, ch. 104, § 5(2)(a), (5), (6), (7), (11), and (14), 24 Stat. 380; Feb. 28, 1920, ch. 91, § 407, 41 Stat. 480; June 16, 1933, ch. 91, § 202, 48 Stat. 218; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; restated Sept. 18, 1940, ch. 722, § 7, 54 Stat. 907; Aug. 2, 1949, ch. 379, § 4, 63 Stat. 486; July 27, 1965, Pub. L. 89-93, § 1, 79 Stat. 284; Feb. 5, 1976, Pub. L. 94-210, § 403, 90 Stat. 63.
11343(b) (1st sentence).	49:5(5).	
11343(b) (less 1st sentence).	49:5(6).	
11343(c).....	49:5(7)	
11343(d).....	49:5(11).	

In subsection (a), the words "may be carried out only" are substituted for "It shall be lawful" as being more precise. The words "providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title" are added for clarity. The words "as provided in subdivision (b) of this paragraph or paragraph (3)" are omitted as unnecessary in view of the restatement of 49:5. The words "or any part thereof" are omitted as surplus. The word "previously" is substituted for "theretofore" as being more appropriate. The words "through ownership of its stock or otherwise" are omitted as surplus and as included in the definition of "control" in section 10102 of the revised title. The word "that" is substituted for "which" as being more appropriate. The word "it" is substituted for "thereto" for clarity.

In subsection (b), the words "A person may . . . only with the approval and authorization of the Commission under this subchapter" are substituted for "It shall be unlawful for any person, except as provided in paragraphs (2) or (3) of this section" for clarity in view of the restatement. The words "referred to in" are substituted for "within the scope of" for clarity. The words "participate in achieving" are substituted for "to accomplish or effectuate, or to participate in accomplishing or effectuating" as being more inclusive. The words "including the power to exercise control or management" are substituted for 49:5(5) (last sentence) to eliminate the use of a definition. The words "regardless of how that result is reached" are substituted for "however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever" as being more inclusive. The 2d sentence of 49:5(5) is omitted as obsolete. The words "For the purposes of this section" are omitted as unnecessary in view of the restatement. The words "In addition to other transactions" are substituted for "but not in anywise limiting the application of the provisions thereof" for clarity. The words "are considered" are substituted for "shall be deemed" for clarity. The words "A transaction . . . has the effect" are substituted for "and if the effect of such transaction is" for clarity.

In subsection (c), the words "A person is affiliated with a carrier under this subchapter" are substituted for "For the purposes of this section, a person shall be

held to be affiliated with a carrier" for clarity. The words "(whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means)" are omitted as surplus.

In subsection (d), the words "Approval and authorization by the Commission are not required" are substituted in both places for "Nothing in this section shall be construed to require the approval or authorization of the Commission" for clarity. The word "if" is substituted for "in the case of . . . where" for clarity. The words "were not more than" are substituted for "have not exceeded" for consistency. The word "before" is substituted for "preceding" for clarity. The last sentence of subsection (c)(1) is substituted for "(but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of this title)" for clarity and to more fully state the exception. The word "steam" is omitted as surplus in view of 49:1(18) and 1a(1).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1377, 1654, 11321, 11344, 11345, 11912 of this title.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1436.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
11344(a).....	49:5(2)(b) (less last sentence).	Feb. 4, 1887, ch. 104, § 5(2)(b)-(e), 24 Stat. 380; Feb. 28, 1920, ch. 91, § 407, 41 Stat. 480; June 10, 1921, ch. 20, § 1, 42 Stat. 27, June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; restated Sept. 18, 1940, ch. 722, § 7, 54 Stat. 907; Aug. 2, 1949, ch. 379, § 3, 63 Stat. 485.
11344(b).....	49:5(2)(c).	
11344(c).....	49:5(2)(b) (last sentence), (d), (e).	

In subsection (a), the words "may begin a proceeding" are substituted for "and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing;" for clarity and consistency in view of subchapter II of chapter 5 of title 5 and section 10327 of the revised title. The words "referred to in section 11343 of this title" are substituted for "under subdivision (a) of this paragraph" for consistency. The words "when an application is filed" are substituted for "shall present an application" for clarity. The words "and shall notify those carriers" are substituted for "and also such carriers and the applicant or applicants" for clarity and to eliminate redundancy since the applicant is on notice by filing the application.

In subsection (b), the words "In a proceeding under this section" are substituted for "In passing upon any proposed transaction under the provisions of this paragraph" for clarity. The words "at least" are substituted for "among others" for clarity. The word "area" is substituted for "territory" as being more appropriate.

In subsection (c), the words "The Commission shall . . . when it finds . . . may impose conditions governing the transaction" are substituted for "If the Commission finds, subject to such terms and conditions and such modifications as it shall find to be just and reasonable" for clarity. The word "conditions" is substituted for "terms and conditions" to eliminate redundancy. The words "just and reasonable" are omitted in view of the words "the transaction is consistent with the public interest" and in view of section 706 of

title 5. The words "such modifications" are omitted as unnecessary in view of the restatement. The words "the proposed transaction is within the scope of subdivision (a) of this paragraph" are omitted as unnecessary in view of the restatement. The words "enter an order" are omitted as unnecessary in view of subchapter II of chapter 5 of title 5. The words "upon the terms and conditions, and with the modifications, so found to be just and reasonable" are omitted as surplus. The words "When a rail carrier" are substituted for "*Provided*, That if a carrier by railroad subject to this chapter" for clarity. The words "within the meaning of paragraph (6) of this section" are omitted as unnecessary in view of the restatement. The words "in the case of any such proposed" are omitted as surplus. The words "only if it finds" are substituted for "shall not enter such an order unless it finds" for clarity. The words "transaction is consistent" are substituted for "transaction proposed will be consistent" for clarity. The word "unreasonably" is substituted for "unduly" for clarity. The words "When a rail carrier is involved in the transaction, the Commission may" are substituted for "The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction" for clarity. The words "upon equitable terms" are omitted in view of the words "finds . . . inclusion to be consistent with the public interest" and in view of section 706 of title 5. The words "if they apply for inclusion" are substituted for "upon petition by such railroad or railroads requesting such inclusion" for clarity.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1654, 11321, 11345, 11346, 11347, 11348, 11912 of this title.

§ 11345. Consolidation, merger, and acquisition of control: rail carrier procedure

(a) If a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is involved in a proposed transaction under section 11343 of this title, this section and section 11344 of this title also apply to the transaction. The Commission shall publish notice of the application in the Federal Register by the end of the 30th day after the application is filed with the Commission and after a certified copy of it is furnished to the Secretary of Transportation. However, if the application is incomplete, the Commission shall reject it by the end of that period. The order of rejection is a final action of the Commission under section 10327 of this title.

(b) Written comments about an application may be filed with the Commission within 45 days after notice of the application is published under subsection (a) of this section. Copies of those comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(c) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 90th day after publication of notice under that subsection.

(d) The Commission must conclude evidentiary proceedings by the 240th day after the date of publication of notice under subsection (a) of this section. However, if the application involves the merger or control of at least 2 class I railroads, as defined by the Commission, it must conclude evidentiary proceedings by the end of the 24th month after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 180th day after the date it concludes the evidentiary proceedings. If the Commission does not issue a decision that is a final action under section 10327 of this title, it shall send written notice to Congress that a decision was not issued and the reason why it was not issued.

(e) The Commission may waive the requirement that an initial decision be made under section 10327 of this title and make a final decision itself when it determines that action is required for the timely execution of its functions under this subchapter or that an application governed by this section is of major transportation importance. The decision of the Commission under this subsection is a final action under section 10327 of this title.

(f) The Secretary of Transportation may propose changes in transactions governed by this section when a rail carrier is involved. The Secretary may appear before the Commission to support those changes.

(Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1436.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
11345(a).....	49:5(2)(g)(i).	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 5(2)(g), (h); added Feb. 5, 1976, Pub. L. 94-210, § 402(b), 90 Stat. 62.
11345(b).....	49:5(2)(g)(ii), (iii).	
11345(c).....	49:5(2)(g)(iv).	
11345(d).....	49:5(2)(g)(v), (vi), and (2d sentence).	
11345(e).....	49:5(2)(g) (less (i)–(vi) and 2d sentence).	
11345(f).....	49:5(2)(h).	

In the section, the introductory language before 49:5(2)(g)(i) is used throughout for clarity in view of the restatement.

In subsection (a), the words "is a final action of the Commission under section 10327 of this title" are substituted for "which order shall be deemed to be final under the provisions of section 17 of this title" for clarity.

In subsection (b), the words "Written comments . . . may be filed" are substituted for "provide that written comments on an application . . . may be filed" for clarity. The words "That decision must be made by the 15th day after" are substituted for "shall be afforded 15 days following the date" for clarity.

In subsection (c), the words "in whole or in part" are omitted as surplus. The word "given" is substituted for "furnished" as being more appropriate.

In subsection (d), the words "does not issue" are substituted for "fails to issue" as being more precise. The words "final action under section 10327 of this title" are substituted for "which is final within the meaning

of section 17 of this title" for consistency. The words "send written notice to Congress" are substituted for "notify the Congress in writing" for clarity.

In subsection (e), the words "waive the requirement that an initial decision be made under section 10327 of this title and make a final decision itself" are substituted for "it may order that the case be referred directly (without an initial decision by a division, individual Commissioner, board, or administrative law judge) to the full Commission for a decision" for consistency and clarity in view of section 10327 of the revised title. The word "due" is omitted as surplus.

In subsection (f), the words "rail carrier" are substituted for "carrier by railroad" for consistency. The words "may appear" are substituted for "shall have standing to appear" for clarity.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 11346, 11347, 11348, 11912 of this title.

§ 11346. Consolidation, merger, and acquisition of control: expedited rail carrier procedure

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title or the Secretary of Transportation may apply, before January 1, 1982, for authority for and approval of a merger, consolidation, unification or coordination project (as described in section 1654(c) of this title), joint use of tracks or other facilities, or acquisition or sale of assets involving one of those rail carriers, under this section instead of sections 11344 and 11345 of this title. The Secretary may apply under this section only when the parties to the application that are rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter consent to an application by the Secretary. A rail carrier may apply under this section only if it sent the proposed transaction to the Secretary for a report under section 11350 of this title at least 6 months before applying under this section.

(b) When the Commission notifies persons required to receive notice that an application has been filed under this section, the Commission must include in the notice a copy of the application, a summary of the proposed transaction, and the applicant's reasons and public interest justification for the transaction. When the Commission notifies the Secretary of Transportation that an application has been filed under this section, the Commission shall also request the report of the Secretary prepared under section 11350 of this title. By the 10th day after receiving an application under this section, the Commission shall send notice of the proposed transaction to—

(1) the chief executive officer of each State that may be affected by the execution or implementation of the proposed transaction;

(2) the Attorney General;

(3) the Secretary of Labor; and

(4) the Secretary of Transportation (unless the Secretary is the applicant under subsection (a) of this section).

(c) The Commission shall designate a panel of the Commission to make a recommended decision on each application under this section. The panel must begin a proceeding by the 90th day after the date the Commission receives the application, complete the proceeding by the 180th day after the application is referred to it, and give its recommended decision and certify the record to the entire Commission by the 90th day after the proceeding is completed. The panel may use employees appointed under section 3105 of title 5 and the Rail Services Planning Office in conducting the proceeding, evaluating the application and comments received about it, and determining whether it is in the public interest to approve and authorize the transaction under the last sentence of subsection (d) of this section. To carry out this subsection, the panel may make rules and rulings to avoid unnecessary costs and delay. In making its recommended decision, the panel shall—

(1) request the views of the Secretary of Transportation about the effect of the transaction on the national transportation policy, as stated by the Secretary, and consider the report submitted under section 11350 of this title;

(2) request the views of the Attorney General about the effect of the transaction on competition; and

(3) request the views of the Secretary of Labor about the effect of the transaction on rail carrier employees, particularly whether the proposal contains adequate employee protection provisions.

The Secretaries and the Attorney General shall send their written views to the panel. Those statements are available to the public under section 552(a) of title 5.

(d) When the recommended decision and record of a proceeding under this section are certified to the entire Commission, it must hear oral argument on the matter certified to it and make a final decision by the 120th day after receiving the recommended decision and record. The Commission may extend a time period under subsection (c) of this section or under this subsection but must make its final decision by the end of the 2d year after receipt of the application by the Commission. The Commission shall consider the report of the Secretary of Transportation under section 11350 of this title in making its final decision. The final decision must be accompanied by a written opinion stating the reasons for the Commission action. The Commission may—

(1) approve the transaction if the Commission determines the transaction is in the public interest;

(2) approve the transaction with conditions and modifications that it determines are in the public interest; or

(3) disapprove the transaction if it determines the transaction is not in the public interest.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1437.)

49 U.S.C. § 11344 (1982)

accomplishing or effectuating" as being more inclusive. The words "including the power to exercise control or management" are substituted for 49:5(5) (last sentence) to eliminate the use of a definition. The words "regardless of how that result is reached" are substituted for "however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever" as being more inclusive. The 2d sentence of 49:5(5) is omitted as obsolete. The words "For the purposes of this section" are omitted as unnecessary in view of the restatement. The words "In addition to other transactions" are substituted for "but not in anywise limiting the application of the provisions thereof" for clarity. The words "are considered" are substituted for "shall be deemed" for clarity. The words "A transaction . . . has the effect" are substituted for "and if the effect of such transaction is" for clarity.

In subsection (c), the words "A person is affiliated with a carrier under this subchapter" are substituted for "For the purposes of this section, a person shall be held to be affiliated with a carrier" for clarity. The words "(whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means)" are omitted as surplus.

In subsection (d), the words "Approval and authorization by the Commission are not required" are substituted in both places for "Nothing in this section shall be construed to require the approval or authorization of the Commission" for clarity. The word "if" is substituted for "in the case of . . . where" for clarity. The words "were not more than" are substituted for "have not exceeded" for consistency. The word "before" is substituted for "preceding" for clarity. The last sentence of subsection (c)(1) is substituted for "(but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of this title)" for clarity and to more fully state the exception. The word "steam" is omitted as surplus in view of 49:1(18) and 1a(1).

AMENDMENTS

1982—Subsec. (e). Pub. L. 97-261 added subsec. (e).

1980—Subsec. (d)(1). Pub. L. 96-296 substituted "$2,000,000" for "$300,000".

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-261 effective on the 60th day after Sept. 20, 1982, see section 31(a) of Pub. L. 97-261, set out as a note under section 10101 of this title.

SAVINGS PROVISIONS

Pub. L. 96-448, title II, § 228(e), Oct. 14, 1980, 94 Stat. 1934, provided that: "Any application filed or pending on the effective date of this Act [Oct. 1, 1980] under section 11343, 11344, or 11345 of title 49, United States Code, before the Secretary of Transportation, the Interstate Commerce Commission, or any court shall be adjudicated or determined as if this Act [see Short Title of 1980 Amendment note set out under section 10101 of this title] had not been enacted."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 333, 11321, 11344, 11345, 11345a, 11351, 11912 of this title; section 1377 of Appendix to this title.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated

with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5(a)–(d) of the Department of Transportation Act [1] (49 U.S.C. 1654(a)–(d)), accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

49 U.S.C. § 11344 (1994)

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TITLE 47—TELEGRAPHS, TELEPHONES, AND
RADIOTELEGRAPHS

TO

TITLE 49—TRANSPORTATION

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words "(whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means)" are omitted as surplus.

In subsection (d), the words "Approval and authorization by the Commission are not required" are substituted in both places for "Nothing in this section shall be construed to require the approval or authorization of the Commission" for clarity. The word "if" is substituted for "in the case of . . . where" for clarity. The words "were not more than" are substituted for "have not exceeded" for consistency. The word "before" is substituted for "preceding" for clarity. The last sentence of subsection (c)(1) is substituted for "(but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of this title)" for clarity and to more fully state the exception. The word "steam" is omitted as surplus in view of 49:1(18) and 1a(1).

AMENDMENTS

1982—Subsec. (e). Pub. L. 97–261 added subsec. (e).

1980—Subsec. (d)(1). Pub. L. 96–296 substituted "$2,000,000" for "$300,000".

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–261 effective on 60th day after Sept. 20, 1982, see section 31(a) of Pub. L. 97–261, set out as a note under section 10101 of this title.

SAVINGS PROVISION

Pub. L. 96–448, title II, § 228(e), Oct. 14, 1980, 94 Stat. 1934, provided that: "Any application filed or pending on the effective date of this Act [Oct. 1, 1980] under section 11343, 11344, or 11345 of title 49, United States Code, before the Secretary of Transportation, the Interstate Commerce Commission, or any court shall be adjudicated or determined as if this Act [see Short Title of 1980 Amendment note set out under section 10101 of this title] had not been enacted."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 333, 11321, 11344, 11345, 11345a, 11351, 11912 of this title.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of

trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1436; Pub. L. 96-448, title II, § 228(a)-(c), Oct. 14, 1980, 94 Stat. 1931; Pub. L. 97-261, § 21(f), (g), Sept. 20, 1982, 96 Stat. 1123; Pub. L. 98-216, § 2(4), Feb. 14, 1984, 98 Stat. 5.)

HISTORICAL AND REVISION NOTES

PUB. L. 95-473

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
11344(a)	49:5(2)(b) (less last sentence).	Feb. 4, 1887, ch. 104, § 5(2)(b)-(e), 24 Stat. 380; Feb. 28, 1920, ch. 91, § 407, 41 Stat. 480; June 10, 1921, ch. 20, § 1, 42 Stat. 27; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; restated Sept. 18, 1940, ch. 722, § 7, 54 Stat. 907; Aug. 2, 1949, ch. 379, § 3, 63 Stat. 485.
11344(b)	49:5(2)(c).	
11344(c)	49:5(2)(b) (last sentence), (d), (e).	

In subsection (a), the words "may begin a proceeding" are substituted for "and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing;" for clarity and consistency in view of subchapter II of chapter 5 of title 5 and section 10327 of the revised title. The words "referred to in section 11343 of this title" are substituted for "under subdivision (a) of this paragraph" for consistency. The words "when an application is filed" are substituted for "shall present an application" for clarity. The words "and shall notify those carriers" are substituted for "and also such carriers and the applicant or applicants" for clarity and to eliminate redundancy since the applicant is on notice by filing the application.

In subsection (b), the words "In a proceeding under this section" are substituted for "In passing upon any proposed transaction under the provisions of this paragraph" for clarity. The words "at least" are substituted for "among others" for clarity. The word "area" is substituted for "territory" as being more appropriate.

In subsection (c), the words "The Commission shall . . . when it finds . . . may impose conditions governing the transaction" are substituted for "If the Commission finds, subject to such terms and conditions and such modifications as it shall find to be just and reasonable" for clarity. The word "conditions" is substituted for "terms and conditions" to eliminate redundancy. The words "just and reasonable" are omitted in view of the words "the transaction is consistent with the public interest" and in view of section 706 of title 5. The words "such modifications" are omitted as unnecessary in view of the restatement. The words "the proposed transaction is within the scope of subdivision (a) of this paragraph" are omitted as unnecessary in view of the restatement. The words "enter an order" are omitted as unnecessary in view of subchapter II of chapter 5 of title 5. The words "upon the terms and conditions, and with the modifications, so found to be just and reasonable" are omitted as surplus. The words "When a rail carrier" are substituted for "*Provided*, That if a carrier by railroad subject to this chapter" for clarity. The words "within the meaning of paragraph (6) of this section" are omitted as unnecessary in view of the restatement. The words "in the case of any such proposed" are omitted as surplus. The words "only if it finds" are substituted for "shall not enter such an order unless it finds" for clarity. The words "transaction is consistent" are substituted for "transaction proposed will be consistent" for clarity. The word "unreasonably" is substituted for "unduly" for clarity. The words "When a rail carrier is involved in the transaction, the Commission may" are substituted for "The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction" for clarity. The words "upon equitable terms" are omitted in view of the words "finds . . . inclusion to be consistent with the public interest" and in view of section 706 of title 5. The words "if they apply for inclusion" are substituted for "upon petition by such railroad or railroads requesting such inclusion" for clarity.

PUB. L. 98-216

This amends cross-references in sections 10904(d)(2) and (e)(3) and 11344(d) of title 49 affected by the codification of subtitle I of title 49 by section 1 of the Act of January 12, 1983 (Pub. L. 97-449, 96 Stat. 2413).

AMENDMENTS

1984—Subsec. (d). Pub. L. 98-216 substituted "section 333(a)-(d) of this title" for "section 5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654(a)-(d))".

1982—Subsec. (b). Pub. L. 97-261, § 21(f), redesignated existing provisions as par. (1) and former pars. (1) through (5) as subpars. (A) through (E), respectively, and added par. (2).

Subsec. (d). Pub. L. 97-261, § 21(g), inserted provision that this subsection does not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

1980—Subsec. (b). Pub. L. 96-448, § 228(a), inserted in provision preceding par. (1) "which involves the merger or control of at least two class I railroads, as defined by the Commission" after "this section" and added par. (5).

Subsecs. (d), (e). Pub. L. 96-448, § 228(b), (c), added subsecs. (d) and (e).

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-261 effective on 60th day after Sept. 20, 1982, see section 31(a) of Pub. L. 97-261, set out as a note under section 10101 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-448 effective Oct. 1, 1980, see section 710(a) of Pub. L. 96-448, set out as a note under section 10101 of this title.

SAVINGS PROVISION

Pub. L. 99-570, title III, § 3403, Oct. 27, 1986, 100 Stat. 3207-102, provided that: "In any proceeding under section 11344 of title 49, United States Code, involving an application by a rail carrier (or a person controlled by or affiliated with a rail carrier) to acquire a motor carrier, the Interstate Commerce Commission, and any Federal court reviewing action of the Commission, shall follow the standards set forth in the Commission decision in Ex Parte No. 438 if the applicant rail carrier, between July 20, 1984, and September 30, 1986 (1) filed an application with the Commission to acquire a motor carrier, (2) entered into a contract or signed a letter of intent to acquire a motor carrier, or (3) made a public tender offer to acquire a motor carrier."

Applications filed or pending on Oct. 1, 1980, under this section, before the Secretary of Transportation, the Interstate Commerce Commission, or any court to be adjudicated or determined as if Pub. L. 96-448 had not been enacted, see section 228(e) of Pub. L. 96-448, set out as a note under section 11343 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 333, 11321, 11345, 11345a, 11346, 11347, 11348, 11351, 11912 of this title; title 45 sections 1112, 1322.

§ 11345. Consolidation, merger, and acquisition of control: rail carrier procedure

(a) If a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is involved in a proposed transaction under section 11343 of this title, this section and section 11344 of this title also apply to the transaction. The Commission shall publish notice of the application in the Federal Register by the end of the 30th day after the application is filed with the Commission and after a certified copy of it is furnished to the Secretary of Transportation. However, if the application is incomplete, the Commission shall reject it by the end of that period. The order of rejection is a final action of the Commission under section 10327 of this title. The published notice shall indicate whether the application involves—

(1) the merger or control of at least two class I railroads, as defined by the Commission, to be decided within the time limits specified in subsection (b) of this section;

(2) transactions of regional or national transportation significance, to be decided within the time limits specified in subsection (c) of this section; or

(3) any other transaction covered by this section, to be decided within the time limits specified in subsection (d) of this section.

(b) If the application involves the merger or control of two or more class I railroads, as defined by the Commission:

(1) Written comments about an application may be filed with the Commission within 45 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 90th day after publication of notice under that subsection.

(3) The Commission must conclude evidentiary proceedings by the end of the 24th month after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 180th day after the date on which it concludes the evidentiary proceedings.

(c) If the application involves a transaction other than the merger or control of at least two class I railroads, as defined by the Commission, which the Commission has determined to be of regional or national transportation significance:

(1) Written comments about an application may be filed with the Commission within 30 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 60th day after publication of notice under that subsection.

eliminate a railroad-highway grade crossing or accomplish other railroad involved work.

A diagnostic team means a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing or a group of crossings.

Main line railroad track means a track of a principal line of a railroad, including extensions through yards, upon which trains are operated by timetable or train order or both, or the use of which is governed by block signals or by centralized traffic control.

Passive warning devices means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

Preliminary engineering shall mean the work necessary to produce construction plans, specifications, and estimates to the degree of completeness required for undertaking construction thereunder, including locating, surveying, designing, and related work.

Railroad shall mean all rail carriers, publicly-owned, private, and common carriers, including line haul freight and passenger railroads, switching and terminal railroads and passenger carrying railroads such as rapid transit, commuter and street railroads.

Utility shall mean the lines and facilities for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, water, steam, sewer and similar commodities.

[40 FR 16059, Apr. 9, 1975, as amended at 62 FR 45328, Aug. 27, 1997]

§ 646.206 Types of projects.

(a) Projects for the elimination of hazards, to both vehicles and pedestrians, of railroad-highway crossings may include but are not limited to:

(1) Grade crossing elimination;

(2) Reconstruction of existing grade separations; and

(3) Grade crossing improvements.

(b) Other railroad-highway projects are those which use railroad properties or involve adjustments to railroad facilities required by highway construction but do not involve the elimination of hazards of railroad-highway crossings. Also included are adjustments to facilities that are jointly owned or used by railroad and utility companies.

§ 646.208 Funding.

(a) Railroad/highway crossing projects may be funded through the Federal-aid funding source appropriate for the involved project.

(b) Projects for the elimination of hazards at railroad/highway crossings may, at the option of the State, be funded with the funds provided by 23 U.S.C. 133(d)(1).

[62 FR 45328, Aug 27, 1997]

§ 646.210 Classification of projects and railroad share of the cost.

(a) State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.

(b) Pursuant to 23 U.S.C. 130(b), and 49 CFR 1.48:

(1) Projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs.

(2) Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs.

(3) On projects for the elimination of existing grade crossings at which active warning devices are in place or ordered to be installed by a State regulatory agency, the railroad share of the project costs shall be 5 percent.

(4) On projects for the elimination of existing grade crossings at which active warning devices are not in place and have not been ordered installed by a State regulatory agency, or on projects which do not eliminate an existing crossing, there shall be no required railroad share of the project cost.

(c) The required railroad share of the cost under § 646.210(b)(3) shall be based on the costs for preliminary engineering, right-of-way and construction within the limits described below:

(1) Where a grade crossing is eliminated by grade separation, the structure and approaches required to transition to a theoretical highway profile which would have been constructed if there were no railroad present, for the number of lanes on the existing highway and in accordance with the current design standards of the State highway agency.

(2) Where another facility, such as a highway or waterway, requiring a bridge structure is located within the limits of a grade separation project, the estimated cost of a theoretical structure and approaches as described in § 646.210(c)(1) to eliminate the railroad-highway grade crossing without considering the presence of the waterway or other highway.

(3) Where a grade crossing is eliminated by railroad or highway relocation, the actual cost of the relocation project, the estimated cost of the relocation project, or the estimated cost of a structure and approaches as described in § 646.210(c)(1), whichever is less.

(d) Railroads may voluntarily contribute a greater share of project costs than is required. Also, other parties may voluntarily assume the railroad's share.

§ 646.212 Federal share.

(a) *General.* (1) Federal funds are not eligible to participate in costs incurred solely for the benefit of the railroad.

(2) At grade separations Federal funds are eligible to participate in costs to provide space for more tracks than are in place when the railroad establishes to the satisfaction of the State highway agency and FHWA that it has a definite demand and plans for installation of the additional tracks within a reasonable time.

(3) The Federal share of the cost of a grade separation project shall be based on the cost to provide horizontal and/or vertical clearances used by the railroad in its normal practice subject to limitations as shown in the appendix or as required by a State regulatory agency.

(b) The Federal share of railroad/highway crossing projects may be:

(1) Regular pro rata sharing as provided by 23 U.S.C. 120(a) and 120(b).

(2) One hundred percent Federal share, as provided by 23 U.S.C. 120(c).

(3) Ninety percent Federal share for funds made available through 23 U.S.C. 133(d)(1).

[40 FR 16059, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 53 FR 32218, Aug. 24, 1988; 62 FR 45328, Aug. 27, 1997]

§ 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices,* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(f) At the request of an applicant and at the discretion of the Responsible Official, an applicant may prepare an EA or EIS and supporting documents or enter into a third-party contract pursuant to § 6.303.

(g) The Responsible Official must review, and take responsibility for the completed NEPA documents, before rendering a final decision on the proposed action.

§ 6.303 Third-party agreements.

(a) If an EA or EIS is to be prepared for an action subject to subparts A through C of this part, the Responsible Official and the applicant may enter into an agreement whereby the applicant engages and pays for the services of a third-party contractor to prepare an EA or EIS and any associated documents for consideration by EPA. In such cases, the Responsible Official must approve the qualifications of the third-party contractor. The third-party contractor must be selected on the basis of ability and absence of any conflict of interest. Consistent with 40 CFR 1506.5(c), in consultation with the applicant, the Responsible Official shall select the contractor. The Responsible Official must provide guidance to the applicant and contractor regarding the information to be developed, including the project's scope, and guide and participate in the collection, analysis, and presentation of the information. The Responsible Official has sole authority for final approval of and EA or EIS.

(1) The applicant must engage and pay for the services of a contractor to prepare the EA or EIS and any associated documents without using EPA financial assistance (including required match).

(2) The Responsible Official, in consultation with the applicant, must ensure that the contractor is qualified to prepare an EA or EIS, and that the substantive terms of the contract specify the information to be developed, and the procedures for gathering, analyzing and presenting the information.

(3) The Responsible Official must prepare a disclosure statement for the applicant to include in the contract specifying that the contractor has no financial or other interest in the outcome of the project (see 40 CFR 1506.5(c)).

(4) The Responsible Official will ensure that the EA or EIS and any associated documents contain analyses and conclusions that adequately assess the relevant environmental issues.

(b) In order to make a decision on the action, the Responsible Official must independently evaluate the information submitted in the EA or EIS and any associated documents, and issue an EA or draft and final EIS. After review of, and appropriate changes to, the EA or EIS submitted by the applicant, the Responsible Official may accept it as EPA's document. The Responsible Official is responsible for the scope, accuracy, and contents of the EA or EIS and any associated documents (see 40 CFR 1506.5).

(c) A third-party agreement may not be initiated unless both the applicant and the Responsible Official agree to its creation and terms.

(d) The terms of the contract between the applicant and the third-party contractor must ensure that the contractor does not have recourse to EPA for financial or other claims arising under the contract, and that the Responsible Official, or other EPA designee, may give technical advice to the contractor.

Subpart D—Assessing the Environmental Effects Abroad of EPA Actions

AUTHORITY: 42 U.S.C. 4321, note, E O. 12114, 44 FR 1979, 3 CFR, 1979 Comp , p. 356.

§ 6.400 Purpose and policy.

(a) *Purpose.* On January 4, 1979, the President signed Executive Order 12114 entitled "Environmental Effects Abroad of Major Federal Actions." The purpose of this Executive Order is to enable responsible Federal officials in carrying out or approving major Federal actions which affect foreign nations or the global commons to be informed of pertinent environmental considerations and to consider fully the environmental impacts of the actions undertaken. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act (NEPA) (42 U.S.C.

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508 4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U S C 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement

(d) Commence the scoping process (§ 1501 7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978, 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501 8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed

action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

among alternatives). The summary will normally not exceed 15 pages.

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(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

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(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor.* An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers)

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq*), sec 309 of the Clean Air Act, as amended (42 U.S C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(4) A shipment of a quantity of hazardous materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids;

(5) A shipment in other than a bulk packaging of 2,268 kg (5,000 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required for that class under the provisions of subpart F of this part;

(6) A select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR part 73 or, by April 1, 2007, a select agent or toxin regulated by the United States Department of Agriculture under 9 CFR part 121; or

(7) A quantity of hazardous material that requires placarding under the provisions of subpart F of this part.

(c) *Exceptions.* Transportation activities of a farmer, who generates less than $500,000 annually in gross receipts from the sale of agricultural commodities or products, are not subject to this subpart if such activities are:

(1) Conducted by highway or rail;

(2) In direct support of their farming operations; and

(3) Conducted within a 150-mile radius of those operations.

[68 FR 14521, Mar. 25, 2003, as amended at 70 FR 73164, Dec. 9, 2005; 71 FR 32258, June 2, 2006]

§ 172.802 Components of a security plan.

(a) The security plan must include an assessment of possible transportation security risks for shipments of the hazardous materials listed in § 172.800 and appropriate measures to address the assessed risks. Specific measures put into place by the plan may vary commensurate with the level of threat at a particular time. At a minimum, a security plan must include the following elements:

(1) *Personnel security.* Measures to confirm information provided by job applicants hired for positions that involve access to and handling of the hazardous materials covered by the security plan. Such confirmation system must be consistent with applicable Federal and State laws and requirements concerning employment practices and individual privacy.

(2) *Unauthorized access.* Measures to address the assessed risk that unauthorized persons may gain access to the hazardous materials covered by the security plan or transport conveyances being prepared for transportation of the hazardous materials covered by the security plan.

(3) *En route security.* Measures to address the assessed security risks of shipments of hazardous materials covered by the security plan en route from origin to destination, including shipments stored incidental to movement.

(b) The security plan must be in writing and must be retained for as long as it remains in effect. Copies of the security plan, or portions thereof, must be available to the employees who are responsible for implementing it, consistent with personnel security clearance or background investigation restrictions and a demonstrated need to know. The security plan must be revised and updated as necessary to reflect changing circumstances. When the security plan is updated or revised, all copies of the plan must be maintained as of the date of the most recent revision.

§ 172.804 Relationship to other Federal requirements.

To avoid unnecessary duplication of security requirements, security plans that conform to regulations, standards, protocols, or guidelines issued by other Federal agencies, international organizations, or industry organizations may be used to satisfy the requirements in this subpart, provided such security plans address the requirements specified in this subpart.

§ 172.820 Additional planning requirements for transportation by rail.

(a) *General.* Each rail carrier transporting in commerce one or more of the following materials is subject to the additional safety and security planning requirements of this section:

(1) More than 2,268 kg (5,000 lbs) in a single carload of a Division 1.1, 1.2 or 1.3 explosive;

(2) A quantity of a material poisonous by inhalation in a single bulk packaging; or

(3) A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in §173.403 of this subchapter.

(b) *Commodity data.* Not later than 90 days after the end of each calendar year, a rail carrier must compile commodity data for the previous calendar year for the materials listed in paragraph (a) of this section, except that for calendar year 2008, data may be compiled for the 6-month period beginning July 1, 2008. The following stipulations apply to data collected:

(1) Commodity data must be collected by route, a line segment or series of line segments as aggregated by the rail carrier. Within the rail carrier selected route, the commodity data must identify the geographic location of the route and the total number of shipments by UN identification number for the materials specified in paragraph (a) of this section.

(2) A carrier may compile commodity data, by UN number, for all Class 7 materials transported (instead of only highway route controlled quantities of Class 7 materials) and for all Division 6.1 materials transported (instead of only Division 6.1 poison inhalation hazard materials).

(c) *Rail transportation route analysis.* For each calendar year, a rail carrier must analyze the safety and security risks for the transportation route(s), identified in the commodity data collected as required by paragraph (b) of this section. The route analysis must be in writing and include the factors contained in Appendix D to this part, as applicable.

(1) The safety and security risks present must be analyzed for the route and railroad facilities along the route. For purposes of this section, railroad facilities are railroad property including, but not limited to, classification and switching yards, storage facilities, and non-private sidings. This term does not include an offeror's facility, private track, private siding, or consignee's facility.

(2) In performing the analysis required by this paragraph, the rail carrier must seek relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to the route(s) utilized. If a rail carrier is unable to acquire relevant information from state, local, or tribal officials, then it must document that in its analysis. For purposes of this section, a high-consequence target means a property, natural resource, location, area, or other target designated by the Secretary of Homeland Security that is a viable terrorist target of national significance, the attack of which by railroad could result in catastrophic loss of life, significant damage to national security or defense capabilities, or national economic harm.

(d) *Alternative route analysis.* (1) For each calendar year, a rail carrier must identify practicable alternative routes over which it has authority to operate, if an alternative exists, as an alternative route for each of the transportation routes analyzed in accordance with paragraph (c) of this section. The carrier must perform a safety and security risk assessment of the alternative routes for comparison to the route analysis prescribed in paragraph (c) of this section. The alternative route analysis must be in writing and include the criteria in Appendix D of this part. When determining practicable alternative routes, the rail carrier must consider the use of interchange agreements with other rail carriers. The written alternative route analysis must also consider:

(i) Safety and security risks presented by use of the alternative route(s);

(ii) Comparison of the safety and security risks of the alternative(s) to the primary rail transportation route, including the risk of a catastrophic release from a shipment traveling along each route;

(iii) Any remediation or mitigation measures implemented on the primary or alternative route(s); and

(iv) Potential economic effects of using the alternative route(s), including but not limited to the economics of the commodity, route, and customer relationship.

(2) In performing the analysis required by this paragraph, the rail carrier should seek relevant information

from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to the alternative routes. If a rail carrier determines that it is not appropriate to seek such relevant information, then it must explain its reasoning for that determination in its analysis.

(e) *Route Selection.* A carrier must use the analysis performed as required by paragraphs (c) and (d) of this section to select the route to be used in moving the materials covered by paragraph (a) of this section. The carrier must consider any remediation measures implemented on a route. Using this process, the carrier must at least annually review and select the practicable route posing the least overall safety and security risk. The rail carrier must retain in writing all route review and selection decision documentation and restrict the distribution, disclosure, and availability of information contained in the route analysis to covered persons with a need-to-know, as described in parts 15 and 1520 of this title. This documentation should include, but is not limited to, comparative analyses, charts, graphics or rail system maps.

(f) *Completion of route analyses.* (1) Rail carriers have the following options for completing the initial route analysis, alternative route analysis, and route selection process required under paragraphs (c), (d), and (e) of this section:

(i) A rail carrier may complete the initial process by September 1, 2009, using data for the six month period from July 1, 2008 to December 31, 2008; or

(ii) A rail carrier may complete the initial process by March 31, 2010, using data for all of 2008, provided the rail carrier notifies the FRA Associate Administrator of Safety in writing by September 1, 2009 that it has chosen this second option.

(2) Beginning in 2010, the rail transportation route analysis, alternative route analysis, and route selection process required under paragraphs (c), (d), and (e) of this section must be completed no later than the end of the calendar year following the year to which the analyses apply.

(3) The initial analysis and route selection determinations required under paragraphs (c), (d), and (e) of this section must include a comprehensive review of the entire system. Subsequent analyses and route selection determinations required under paragraphs (c), (d), and (e) of this section must include a comprehensive, system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along, or in proximity to, the route, and any other changes affecting the safety or security of the movements of the materials specified in paragraph (a) of this section that were implemented during the calendar year.

(4) A rail carrier need not perform a rail transportation route analysis, alternative route analysis, or route selection process for any hazardous material other than the materials specified in paragraph (a) of this section.

(g) *Rail carrier point of contact on routing issues.* Each rail carrier must identify a point of contact (including the name, title, phone number and e-mail address) on routing issues involving the movement of materials covered by this section in its security plan and provide this information to:

(1) State and/or regional Fusion Centers that have been established to coordinate with state, local and tribal officials on security issues and which are located within the area encompassed by the rail carrier's rail system; and

(2) State, local, and tribal officials in jurisdictions that may be affected by a rail carrier's routing decisions and who directly contact the railroad to discuss routing decisions.

(h) *Storage, delays in transit, and notification.* With respect to the materials specified in paragraph (a) of this section, each rail carrier must ensure the safety and security plan it develops and implements under this subpart includes all of the following:

(1) A procedure under which the rail carrier must consult with offerors and consignees in order to develop measures for minimizing, to the extent practicable, the duration of any storage of the material incidental to movement (see § 171.8 of this subchapter).

(2) Measures to prevent unauthorized access to the materials during storage or delays in transit.

(3) Measures to mitigate risk to population centers associated with in-transit storage.

(4) Measures to be taken in the event of an escalating threat level for materials stored in transit.

(5) Procedures for notifying the consignee in the event of a significant delay during transportation; such notification must be completed within 48 hours after the carrier has identified the delay and must include a revised delivery schedule. A significant delay is one that compromises the safety or security of the hazardous material or delays the shipment beyond its normal expected or planned shipping time. Notification should be made by a method acceptable to both the rail carrier and consignee.

(i) *Recordkeeping.* (1) Each rail carrier must maintain a copy of the information specified in paragraphs (b), (c), (d), (e), and (f) of this section (or an electronic image thereof) that is accessible at, or through, its principal place of business and must make the record available upon request, at a reasonable time and location, to an authorized official of the Department of Transportation or the Department of Homeland Security. Records must be retained for a minimum of two years.

(2) Each rail carrier must restrict the distribution, disclosure, and availability of information collected or developed in accordance with paragraphs (c), (d), (e), and (f) of this section to covered persons with a need-to-know, as described in parts 15 and 1520 of this title.

(j) *Compliance and enforcement.* If the carrier's route selection documentation and underlying analyses are found to be deficient, the carrier may be required to revise the analyses or make changes in route selection. If DOT finds that a chosen route is not the safest and most secure practicable route available, the FRA Associate Administrator for Safety, in consultation with TSA, may require the use of an alternative route. Prior to making such a determination, FRA and TSA will consult with the Surface Transportation Board (STB) regarding whether the contemplated alternative route(s) would be economically practicable.

[73 FR 20771, April 16, 2008, as amended at 73 FR 72193, Dec. 26, 2008]

§ 172.822 Limitation on actions by states, local governments, and Indian tribes.

A law, order, or other directive of a state, political subdivision of a state, or an Indian tribe that designates, limits, or prohibits the use of a rail line (other than a rail line owned by a state, political subdivision of a state, or an Indian tribe) for the transportation of hazardous materials, including, but not limited to, the materials specified in §172.820(a), is preempted. 49 U.S.C. 5125, 20106.

[73 FR 20772, April 16, 2008]

APPENDIX A TO PART 172—OFFICE OF HAZARDOUS MATERIALS TRANSPORTATION COLOR TOLERANCE CHARTS AND TABLES

The following are Munsell notations and Commission Internationale de L'Eclairage (CIE) coordinates which describe the Office of Hazardous Materials Transportation Label and Placard Color Tolerance Charts in tables 1 and 2, and the CIE coordinates for the color tolerances specified in table 3. Central colors and tolerances described in table 2 approximate those described in table 1 while allowing for differences in production methods and materials used to manufacture labels and placards surfaced with printing inks. Primarily, the color charts based on table 1 are for label or placard colors applied as opaque coatings such as paint, enamel or plastic, whereas color charts based on table 2 are intended for use with labels and placards surfaced only with inks.

For labels printed directly on packaging surfaces, table 3 may be used, although compliance with either table 1 or table 2 is sufficient. However, if visual reference indicates that the colors of labels printed directly on package surfaces are outside the table 1 or 2 tolerances, a spectrophotometer or other instrumentation may be required to insure compliance with table 3.

Code of Federal Regulations

49

Transportation

PARTS 1000 TO 1199

Revised as of October 1, 1972

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF OCTOBER 1, 1972

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by the carrier of the required mail transportation service would be detrimental to the carrier or to its other customers, or that the carrier does not operate equipment suitable for the transportation of mail, and shall conform to the provisions of subparagraphs (2), (3), and (4) of this paragraph.

(2) *Content.* The protest for termination of an order or determination filed under this section must identify the issued order or determination (i) by reference to the name and address of the motor carrier shown in the order or determination, (ii) the order number or other identification assigned thereto by the Postal Service, and (iii) specific citation to the volume, page, and date of publication in the FEDERAL REGISTER, i.e., "_____ F.R. _____, _____ 197-" Facts relied upon in support of the protest must be verified as provided in Rule 50 of the Commission's general rules of practice (§ 1100.50).

(3) *When filed.* Protests requesting termination of an order or determination filed under this section will not be considered unless made in writing and filed with the Commission at Washington, D.C., within 15 days of the date of publication of the order or determination in the FEDERAL REGISTER.

(4) *Replies.* Replies confined to rebuttal of such protests may be filed within 10 days of the date on which the protest was filed with the Commission.

(5) *Copies; service.* The original and seven copies of each protest or reply shall be filed with the Commission, and one copy simultaneously shall be served on the opposing party(ies). A certificate shall be executed stating that simultaneous service has been made. The protest or reply and the envelope of transmittal to the Commission should be clearly marked: "Protest (Reply)—Mail Transportation Service Order (or Determination)," and be delivered free of all charges. (Copies for service on the Postal Service shall be addressed to the Assistant General Counsel, Transportation, U.S. Postal Service, Washington, D.C. 20260, as agent for the Postmaster General.)

(e) *Petitions for reconsideration.* Petitions for reconsideration (1) of an order terminating an order or determination of the Postal Service, or (2) of a notice declining to order termination of such an order or determination, may be filed by any interested person within 20 days after service of the order or notice of the Commission. As no replies to the petitions for reconsideration under this rule are contemplated in view of the statutory time limitation, petitioners will be expected, except in unusual circumstances, to rely wholly on the information previously filed with the Commission. Such petitions for reconsideration must be clearly marked: "Petition for Reconsideration—Mail Transportation Service Order (or Determination)." Petitioners shall file an original and seven copies of the petition with the Commission and one copy thereof shall be served simultaneously on the opposing party (ies), and a certificate of service shall be executed to that effect.

(f) *Withdrawal of Postal Service orders or determinations.* If, within 90 days after the filing of an order or determination by the Postal Service, the motor carrier cited in the order or determination volumtarily agrees and undertakes to perform the required mail transportation service, the Postal Service shall promptly notify the Commission of such action and shall withdraw the Postal Service order forthwith.

(Sec. 5203, 84 Stat. 769, 39 U.S.C. 5203; sec. 17, 40 Stat. 270, 49 U.S.C. 17) [36 F.R. 6426, Apr. 3, 1971]

§ 1100.250 Special rules pertaining to all proceedings before the Commission to insure that environmental amenities and values are given appropriate consideration.

(a) *Scope of special rules.* These special rules are applicable to all proceedings before the Commission. They are intended to assist the Commission in discharging its duties under the National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 852) which authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies for the protection of the environment declared in that act.

(b) *Detailed environmental statement.* (1) It shall be the general policy of the Interstate Commerce Commission to adopt and adhere to the objectives and aims of the National Environmental Pol-

icy Act in performing its regulatory duties and powers under the Interstate Commerce Act and related statutes. Among other things, the National Environmental Policy Act requires, to the fullest extent possible, a detailed environmental statement in all reports and recommendations on legislative proposals and other major Federal actions which will significantly affect the quality of the human environment.

(2) In compliance with this requirement, a detailed environment statement will be made when the regulatory action taken by the Commission under the applicable statutes will have such a significant environmental impact. The detailed statement, which statement shall be made as part of the initial decision in the proceeding and shall become final (with or without modification) when a final decision or order is entered by the Commission, shall fully develop the five factors listed below, among other relevant factors including the justification of a proposed action as compared to its alternatives. The following factors are listed merely to illustrate the kinds of values that *must* be considered in the statement, and in no respect is this listing to be construed as covering all factors relevant to the disposition of any particular proceeding:

(i) The environmental impact of the requested action;

(ii) Any adverse environmental effects which cannot be avoided should the requested action be granted;

(iii) Alternatives to the requested action;

(iv) The relationship, if any, between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the requested action should it be granted.

The procedures set forth in this rule are intended to encourage, to the fullest extent possible, public and governmental participation in those formal proceedings which might significantly affect the quality of the human environment, and to the end of insuring that a complete record is developed which will enable the Commission to consider fully the environmental impact of a contemplated action.

(c) *Applicable general and special rules not affected.* The Commission's general and/or special rules heretofore applicable to a proceeding shall remain in effect and govern the procedure therein. These special rules shall supplement the applicable existing rules.

(d) *Papers to show effect of subject matter of proceeding on the quality of human environment.* (1) In all initial papers filed with this Commission by a party, there shall be filed a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in paragraph (b) (2) (i)–(v) of this section.

(2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in paragraph (b) (2) (i)–(v) of this section.

(e) *Notice to appropriate governmental agencies.* (1) All papers submitted in compliance with these rules, and affirmatively alleging a substantial environmental impact, beneficial or adverse, shall be served by the person or persons submitting it on those governmental bodies given notice pursuant to subparagraph (1) of this paragraph. The person or persons submitting the statement also shall supply 10 copies of the statement to the Council on Environmental Quality.

(2) A notice of all proceedings determined to have a significant effect on the quality of the human environment will be transmitted by the Commission as promptly as possible te the Council on Environmental Quality and to appropriate governmental bodies—Federal, regional, State, and local—(as identified in the guidelines promulgated by the Council on Environmental Quality) with a request for public comments on the environmental considerations listed in paragraph (b) (2) (i)–(v) of this section.

(3) All interveners, including other Government agencies, taking a position on environmental matters shall file with the Commission an explanation of their

environmental position, specifying any differences with the original party's detailed statement upon which intervener wishes to make its views known, and including therein a discussion of that position in the context of the factors enumerated in paragraph (b) of this section. All interveners shall be responsible for filing 10 copies of their submission with the Council on Environmental Quality at the time they file with the Commission and shall also supply a copy of such submission to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The Commission will consider all representations submitted prior to the final disposition of the proceeding.

(4) The views of the Council on Environmental Quality, if any, should be made in a written statement served upon the Secretary of the Commission and all parties of record.

(f) *Official notice.* The Commission may take official notice of any facts relating to the environmental situations before it. This shall include, but not be limited to, scientific studies, governmental reports, and maps which have not been presented in evidence by any of the parties of record.

(g) *Determinations.* The determinations in all proceedings which investigate environmental issues should include an evaluation of the environmental factors enumerated in paragraph (b) (2) (i)–(v) of this section, and the views expressed in conjunction therewith by all persons making formal comment pursuant to the provisions of this section. Specific findings should be made in each such proceeding as to whether the relief sought is or is not environmentally advantageous.

(h) *Review of initial decision on environmental impact.* Any decision with respect to the environmental issue will be subject to Commission review in the same manner as other issues in the proceeding.

(i) *Proceedings in progress.* With respect to those proceedings already in progress, the Commission recognizes that it may not be possible to comply fully with the procedures outlined herein and, in particular, that it may not be possible in every instance to include within the record all of the material relating to the environmental impact of the contemplated action which might otherwise be developed. Nonetheless, it is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings already in progress.

(42 U.S.C. 4321, 4322, and 4323) [37 F.R. 6318, Mar. 28, 1972]

SOURCE: 56 FR 36105, July 31, 1991, unless otherwise noted.

§ 1105.1 Purpose.

These rules are designed to assure adequate consideration of environmental and energy factors in the Board's decisionmaking process pursuant to the National Environmental Policy Act, 42 U.S.C. 4332; the Energy Policy and Conservation Act, 42 U.S.C. 6362(b); and related laws, including the National Historic Preservation Act, 16 U.S.C. 470f, the Coastal Zone Management Act, 16 U.S.C. 1451, and the Endangered Species Act, 16 U.S.C. 1531.

§ 1105.2 Responsibility for administration of these rules.

The Director of the Office of Economics, Environmental Analysis, and Administration shall have general responsibility for the overall management and functioning of the Section of Environmental Analysis. The Director is delegated the authority to sign, on behalf of the Board, memoranda of agreement entered into pursuant to 36 CFR 800.5(e)(4) regarding historic preservation matters. The Chief of the Section of Environmental Analysis is responsible for the preparation of documents under these rules and is delegated the authority to provide interpretations of the Board's NEPA process, to render initial decisions on requests for waiver or modification of any of these rules for individual proceedings, and to recommend rejection of environmental reports not in compliance with these rules. This delegated authority shall be used only in a manner consistent with Board policy. The Director may further delegate procedural authority to the Chief of the Section of Environmental Analysis as appropriate. Appeals to the Board will be available as a matter of right.

[56 FR 36105, July 31, 1991, as amended at 64 FR 53268, Oct. 1, 1999]

§ 1105.3 Information and assistance.

Information and assistance regarding the rules and the Board's environmental and historic review process is available by writing or calling the Section of Environmental Analysis, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423.

[64 FR 53268, Oct. 1, 1999]

§ 1105.4 Definitions.

In addition to the definitions contained in the regulations of the Council on Environmental Quality (40 CFR part 1508), the following definitions apply to these regulations:

(a) *Act* means the Interstate Commerce Act, Subtitle IV of Title 49, U.S. Code, as amended.

(b) *Applicant* means any person or entity seeking Board action, whether by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

(c) *Board* means the Surface Transportation Board.

(d) *Environmental Assessment* or "EA" means a concise public document for which the Board is responsible that contains sufficient information for determining whether to prepare an Environmental Impact Statement or to make a finding of no significant environmental impact.

(e) *Environmental documentation* means either an Environmental Impact Statement or an Environmental Assessment.

(f) *Environmental Impact Statement* or "EIS" means the detailed written statement required by the National Environmental Policy Act, 42 U.S.C. 4332(2)(c), for a major Federal action significantly affecting the quality of the human environment.

(g) *Environmental Report* means a document filed by the applicant(s) that:

(1) Provides notice of the proposed action; and

(2) Evaluates its environmental impacts and any reasonable alternatives to the action. An environmental report may be in the form of a proposed draft Environmental Assessment or proposed draft Environmental Impact Statement.

(h) *Filing* means any request for STB authority, whether by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

(i) *Section of Environmental Analysis* or "SEA" means the Section that prepares the Board's environmental documents and analyses.

(j) *Third-Party Consultant* means an independent contractor, utilized by the applicant, who works with SEA's approval and under SEA's direction to prepare any necessary environmental documentation. The third party consultant must act on behalf of the Board. The railroad may participate in the selection process, as well as in the subsequent preparation of environmental documents. However, to avoid any impermissible conflict of interest (*i.e.*, essentially any financial or other interest in the outcome of the railroad-sponsored project), the railroad may not be responsible for the selection or control of independent contractors.

[56 FR 36105, July 31, 1991, as amended at 64 FR 53268, Oct. 1, 1999]

§ 1105.5 Determinative criteria.

(a) In determining whether a "major Federal action" (as that term is defined by the Council on Environmental Quality in 40 CFR 1508.18) has the potential to affect significantly the quality of the human environment, the Board is guided by the definition of "significantly" at 40 CFR 1508.27.

(b) A finding that a service or transaction is not within the STB's jurisdiction does not require an environmental analysis under the National Environmental Policy Act or historic review under the National Historic Preservation Act.

(c) The environmental laws are not triggered where the STB's action is nothing more than a ministerial act, as in:

(1) The processing of abandonments proposed under the Northeast Rail Services Act (45 U.S.C. 744(b)(3));

(2) Statutorily-authorized interim trail use arrangements under 16 U.S.C. 1247(d) [*see*, 49 CFR 1152.29]; or

(3) Financial assistance arrangements under 49 U.S.C. 10905 (*see* 49 CFR 1152.27).

Finally, no environmental analysis is necessary for abandonments that are authorized by a bankruptcy court, or transfers of rail lines under plans of reorganization, where our function is merely advisory under 11 U.S.C. 1166, 1170, and 1172.

[56 FR 36105, July 31, 1991; 56 FR 49821, Oct. 1, 1991]

§ 1105.6 Classification of actions.

(a) Environmental Impact Statements will normally be prepared for rail construction proposals other than those described in paragraph (b)(1) of this section.

(b) Environmental Assessments will normally be prepared for the following proposed actions:

(1) Construction of connecting track within existing rail rights-of-way, or on land owned by the connecting railroads;

(2) Abandonment of a rail line (unless proposed under the Northeast Rail Services Act or the Bankruptcy Act);

(3) Discontinuance of passenger train service or freight service (except for discontinuances of freight service under modified certificates issued under 49 CFR 1150.21 and discontinuances of trackage rights where the affected line will continue to be operated);

(4) An acquisition, lease or operation under 49 U.S.C. 10901 or 10910, or consolidation, merger or acquisition of control under 49 U.S.C. 11343, if it will result in either

(i) Operational changes that would exceed any of the thresholds established in § 1105.7(e) (4) or (5); or

(ii) An action that would normally require environmental documentation (such as a construction or abandonment);

(5) A rulemaking, policy statement, or legislative proposal that has the potential for significant environmental impacts;

(6) Water carrier licensing under 49 U.S.C. 10922 that:

(i) Involves a new operation (*i.e.*, one that adds a significant number of barges to the inland waterway system requiring the addition of towing capacity, or otherwise significantly alters an existing operation, or introduces service to a new waterway that has had no previous traffic, or involves the commencement of a new service that is not statutorily exempt); or

(ii) Involves the transportation of hazardous materials; and

(7) Any other proceeding not listed in paragraphs (a) or (c) of this section.

(c) No environmental documentation will normally be prepared (although a Historic Report may be required under

section 1105.8) for the following actions:

(1) Motor carrier, broker, or freight forwarder licensing and water carrier licensing not included in section 1105.6(b)(6);

(2) Any action that does not result in significant changes in carrier operations (*i.e.*, changes that do not exceed the thresholds established in section 1105.7(e) (4) or (5)), including (but not limited to) all of the following actions that meet this criterion:

(i) An acquisition, lease, or operation under 49 U.S.C. 10901 or 10910, or consolidation, merger, or acquisition of control under 49 U.S.C. 11343 that does not come within subsection (b)(4) of this section.

(ii) Transactions involving corporate changes (such as a change in the ownership or the operator, or the issuance of securities or reorganization) including grants of authority to hold position as an officer or director;

(iii) Declaratory orders, interpretation or clarification of operating authority, substitution of an applicant, name changes, and waiver of lease and interchange regulations;

(iv) Pooling authorizations, approval of rate bureau agreements, and approval of shipper antitrust immunity;

(v) Approval of motor vehicle rental contracts, and self insurance;

(vi) Determinations of the fact of competition;

(3) Rate, fare, and tariff actions;

(4) Common use of rail terminals and trackage rights;

(5) Discontinuance of rail freight service under a modified certificate issued pursuant to 49 CFR 1150.21;

(6) Discontinuance of trackage rights where the affected line will continue to be operated; and

(7) A rulemaking, policy statement, or legislative proposal that has no potential for significant environmental impacts.

(d) The Board may reclassify or modify these requirements for individual proceedings. For actions that generally require no environmental documentation, the Board may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report and either an EA or an EIS will be prepared. For actions generally requiring an EA, the Board may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS. Alternatively, in a rail construction, an applicant can seek to demonstrate (with supporting information addressing the pertinent aspects of § 1105.7(e)) that an EA, rather than an EIS, will be sufficient because the particular proposal is not likely to have a significant environmental impact. Any request for reclassification must be in writing and, in a rail construction, should be presented with the prefiling notice required by § 1105.10(a)(1) (or a request to waive that prefiling notice period).

(e) The classifications in this section apply without regard to whether the action is proposed by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

§ 1105.7 Environmental reports.

(a) *Filing.* An applicant for an action identified in § 1105.6 (a) or (b) must submit to the Board (with or prior to its application, petition or notice of exemption) except as provided in paragraph (b) for abandonments and discontinuances) an Environmental Report on the proposed action containing the information set forth in paragraph (e) of this section.

(b) At least 20 days prior to the filing with the Board of a notice of exemption, petition for exemption, or an application for abandonment or discontinuance, the applicant must serve copies of the Environmental Report on:

(1) The State Clearinghouse of each State involved (or other State equivalent agency if the State has no clearinghouse);

(2) The State Environmental Protection Agency of each State involved;

(3) The State Coastal Zone Management Agency for any state where the proposed activity would affect land or water uses within that State's coastal zone;

(4) The head of each county (or comparable political entity including any Indian reservation) through which the line goes;

(f) Historic preservation conditions imposed by the Board in rail abandonment cases generally will not extend beyond the 330-day statutory time period in 49 U.S.C. 10904 for abandonment proceedings.

[56 FR 36105, July 31, 1991, as amended at 61 FR 67883, Dec. 24, 1996]

§ 1105.9 Coastal Zone Management Act requirements.

(a) If the proposed action affects land or water uses within a State coastal zone designated pursuant to the Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*) applicant must comply with the following procedures:

(1) If the proposed action is listed as subject to review in the State's coastal zone management plan, applicant (with, or prior to its filing) must certify (pursuant to 15 CFR 930.57 and 930.58) that the proposed action is consistent with the coastal zone management plan.

(2) If the activity is not listed, applicant (with, or prior to its filing) must certify that actual notice of the proposal was given to the State coastal zone manager at least 40 days before the effective date of the requested action.

(b) If there is consistency review under 15 CFR 930.54, the Board and the applicant will comply with the consistency certification procedures of 15 CFR 930. Also, the Board will withhold a decision, stay the effective date of a decision, or impose a condition delaying consummation of the action, until the applicant has submitted a consistency certification and either the state has concurred in the consistency certification, or an appeal to the Secretary of Commerce (under 15 CFR 930.64(e)) is successful.

§ 1105.10 Board procedures.

(a) *Environmental Impact Statements*—(1) *Prefiling Notice.* Where an environmental impact statement is required or contemplated, the prospective applicant must provide the Section of Environmental Analysis with written notice of its forthcoming proposal at least 6 months prior to filing its application.

(2) *Notice and scope of EIS.* When an Environmental Impact Statement is prepared for a proposed action, the Board will publish in the FEDERAL REGISTER a notice of its intent to prepare an EIS, with a description of the proposed action and a request for written comments on the scope of the EIS. Where appropriate, the scoping process may include a meeting open to interested parties and the public. After considering the comments, the Board will publish a notice of the final scope of the EIS. If the Environmental Impact Statement is to be prepared in cooperation with other agencies, this notice will also indicate which agencies will be responsible for the various parts of the Statement.

(3) *Notice of availability.* The Board will serve copies of both the draft Environmental Impact Statement (or an appropriate summary) and the full final Environmental Impact Statement (or an appropriate summary) on all parties to the proceeding and on appropriate Federal, State, and local agencies. A notice that these documents are available to the public will be published (normally by the Environmental Protection Agency) in the FEDERAL REGISTER. (Interested persons may obtain copies of the documents by contacting the Section of Environmental Analysis.)

(4) *Comments.* The notice of availability of the draft Environmental Impact Statement will establish the time for submitting written comments, which will normally be 45 days following service of the document. When the Board decides to hold an oral hearing on the merits of a proposal, the draft Environmental Impact Statement will be made available to the public in advance, normally at least 15 days prior to the portion of the hearing relating to the environmental issues. The draft EIS will discuss relevant environmental and historic preservation issues. The final Environmental Impact Statement will discuss the comments received and any changes made in response to them.

(5) *Supplements.* An Environmental Impact Statement may be supplemented where necessary and appropriate to address substantial changes in the proposed action or significant

new and relevant circumstances or information. If so, the notice and comment procedures outlined above will be followed to the extent practical.

(b) *Environmental Assessments.* In preparing an Environmental Assessment, the Section of Environmental Analysis will verify and independently analyze the Environmental Report and/or Historic Report and related material submitted by an applicant pursuant to sections 1105.7 and 1105.8. The Environmental Assessment will discuss relevant environmental and historic preservation issues. SEA will serve copies of the Environmental Assessment on all parties to the proceeding and appropriate federal, state, and local agencies, and will announce its availability to the public through a notice in the FEDERAL REGISTER. In the case of abandonment applications processed under 49 U.S.C. 10903, the availability of the Environmental Assessment must be announced in the applicant's Notice of Intent filed under 49 CFR 1152.21. The deadline for submission of comments on the Environmental Assessment will generally be within 30 days of its service (15 days in the case of a notice of abandonment under 49 CFR 1152.50). The comments received will be addressed in the Board's decision. A supplemental Environmental Assessment may be issued where appropriate.

(c) *Waivers.* (1) The provisions of paragraphs (a)(1) or (a)(4) of this section or any STB-established time frames in paragraph (b) of this section may be waived or modified where appropriate.

(2) Requests for waiver of §1105.10(a)(1) must describe as completely as possible the anticipated environmental effects of the proposed action, and the timing of the proposed action, and show that all or part of the six month lead period is not appropriate.

(d) *Third-Party Consultants.* Applicants may utilize independent third-party consultants to prepare any necessary environmental documentation, if approved by SEA. The environmental reporting requirements that would otherwise apply will be waived if a railroad hires a consultant, SEA approves the scope of the consultant's work, and the consultant works under SEA's supervision. In such a case, the consultant acts on behalf of the Board, working under SEA's direction to collect the needed environmental information and compile it into a draft EA or draft EIS, which is then submitted to SEA for its review, verification, and approval. We encourage the use of third-party consultants.

(e) *Service of Environmental Pleadings.* Agencies and interested parties sending material on environmental and historic preservation issues directly to the Board should send copies to the applicant. Copies of Board communications to third-parties involving environmental and historic preservation issues also will be sent to the applicant where appropriate.

(f) *Consideration in decisionmaking.* The environmental documentation (generally an EA or an EIS) and the comments and responses thereto concerning environmental, historic preservation, CZMA, and endangered species issues will be part of the record considered by the Board in the proceeding involved. The Board will decide what, if any, environmental or historic preservation conditions to impose upon the authority it issues based on the environmental record and its substantive responsibilities under the Interstate Commerce Act. The Board will withhold a decision, stay the effective date of an exemption, or impose appropriate conditions upon any authority granted, when an environmental or historic preservation issue has not yet been resolved.

(g) *Finding of No Significant Impact.* In all exemption cases, if no environmental or historic preservation issues are raised by any party or identified by SEA in its independent investigation, the Board will issue a separate decision making a Finding of No Significant Impact ("FONSI") to show that it has formally considered the environmental record.

[56 FR 36105, July 31, 1991 as amended at 56 FR 49821, Oct. 1, 1991;64 FR 53268, Oct. 1, 1999]

§1105.11 Transmittal letter for Applicant's Report.

A carrier shall send a copy of its Environmental and/or Historic Report to the agencies identified in section 1105.7(b) and/or the appropriate State

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Transportation

PARTS 1000 TO 1199

Revised as of October 1, 1976

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF OCTOBER 1, 1976

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records Service
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as a Special Edition of
the Federal Register

Western Wood Products Association, California Redwood Association, Western Wood Preservers Institute, and Western Plywood Manufacturers' Traffic Conference, jointly
Swift & Company and Swift Chemical Company, jointly
Glass Container Manufacturers Institute, Inc.

STATEMENT OF VIEWS

The National Industrial Traffic League
Carolina Power & Light Company, Duke Power Company, South Carolina Electric & Gas Company, and Virginia Electric and Power Company, jointly
Consumers Power Company
General Mills, Inc.
Producers Grain Corporation
Pacific Northwest Traffic League
Weyerhaeuser Company
California Grape & Tree Fruit League
Monsanto Company
Roberta Simons
Canners League of California

PART 1108—REVISED GUIDELINES FOR IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Subpart A—General Provisions

Subpart B—Definitions

Subpart C—Designation of Responsibility

Subpart D—Identification of Major Federal Actions Significantly Affecting the Quality of the Human Environment

Subpart E—Environmental Procedures

Subpart F—Final Determinations

Subpart G—Miscellaneous Provisions

AUTHORITY: Secs. 17(3), 204(a)(6), 304(a), 403(a) of the Interstate Commerce Act, the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et. seq. (NEPA), and Executive Order 11514, and pursuant to secs. 553 and 559 of the Administrative Procedures Act.

SOURCE: 41 FR 27838, July 7, 1976, unless otherwise noted.

Subpart A—General Provisions

§ 1108.1 Purpose and scope.

(a) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq., hereinafter referred to as NEPA) authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies for the protection and enhancement of the environment as set forth in NEPA, thus establishing national policies, goals, and procedures for protecting and enhancing the environment.

(b) The purpose of these regulations is to amend and supplant the regulations established by order of the Interstate Commerce Commission dated January 14, 1972 (49 CFR 1100.250), and to establish procedures for facilitating the Commission's discharge of its duties under the National Environmental Policy Act of 1969.

(c) These guidelines apply to all proceedings before the Commission.

§ 1108.2 Authority.

(a) NEPA establishes a broad national policy to promote efforts to improve the relationship between man and his environment NEPA sets out certain policies and goals concerning the environment and requires that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted in accordance with those policies and goals. Section 102(2)(C) of NEPA requires that, for each recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, the involved agencies of the Federal Government prepare a detailed statement of the environmental impact of the proposed action, and

that such statement accompany the proposed action through each important stage of the agency decisionmaking process.

(b) Guidelines from the Council on Environmental Quality (CEQ), dated August 1, 1973 (38 FR 20550), set forth recommended procedures which should be followed by Federal agencies in implementing NEPA.

(c) Sections 17(3), 204(a)(6), 304(a) and 403(a) of the Interstate Commerce Act authorize the Commission, consistent with the purpose of the act, to establish such rules, regulations, and procedures as are necessary to the exercise of its functions.

§ 1108.3 Policy.

(a) *General.*—It is the policy of the Commission to implement NEPA to the fullest extent possible and as fully as statutory authority permits and to orient the Commission's administrative policies under the Interstate Commerce Act toward the broad national goal of preserving and enhancing the environment. Environmental factors are to be considered in the decisionmaking process. In accordance with section 101 of NEPA, adverse environmental effects should be minimized to the fullest extent practicable consistent with the national transportation policy and other national policies affecting Commisison action.

(b) *Implementation.*—The implementation of this policy shall consist of an environmental review process as specified in these regulations for all Federal actions under the jurisdiction of this Commission. The policies and goals set forth in NEPA are supplemental to those set forth in the existing authorization of the Interstate Commerce Commission. The Commission will interpret the provisions of NEPA as supplemental to its existing authority and as a mandate to view traditional policies and misisons in the light of national environmental objectives.

(c) *Other statutes.*—Whenever possible, statements required by other statutes concerning environmental impacts, such as the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), will be incorporated into environmental impact statements or threshold assessments.

(d) *Public notice and availability.*—(1) The Commission will insure timely notice and opportunity for public comment on impact statements and threshold assessments in an appropriate manner.

(2) A list of proposed actions for which an environmental impact statement is being prepared will be maintained by the Commission in its Press Release Room. The list will be available for public inspection and will be submitted to CEQ every 3 months for publication.

(e) *Proceedings in progress.*—(1) Proceedings in progress on the effective date of these regulations shall be governed to the fullest extent practicable by the procedures set forth herein, recognizing, however, that full compliance in all such proceedings may not be possible.

(2) Nothing in paragraph (e)(1) of this section shall be deemed to relieve any person or party from complying with a Commission directive to supply environmental data for any proceeding in progress.

§ 1108.4 Interpretations.

Interpretations, either written or oral, with respect to the meaning of these regulations may be rendered by the Director of the Office of Proceedings or designee. Any such interpretation shall be advisory only, and, as such, not binding upon the Commission unless specifically endorsed by the Commission.

§ 1108.5 Waivers or exemptions.

(a) The Commission may, upon its own motion or application of any interested person for good cause shown, tions by order such waivers or exemptions from applicant reporting reqcirements as it determines is authorized by law or otherwise in the public interest. The Commission may waive the requirement that an environmental report accompany an application if it finds that the proposed Federal action is not "major" within the meaning of NEPA, or that the submission of a written environmental report is impractical because of time limitations and would lead to delay having the effect of denying the relief requested.

(b) Every request for a waiver or exemption must be timely filed, in writing, either with the application or not less than 10 days before the due date of the required information.

(c) The granting of a waiver or exemption under these regulations will not be in disregard of any requirement of NEPA nor shall it preclude the Commission from considering environmental

values as part of its decision on the merits.

Subpart B—Definitions

§ 1108.6 Definitions.

As defined in this part:

(a) "Act" means the Interstate Commerce Act, as amended.

(b) "Application" includes a request by an applicant, complainant, or proponent for the granting of any right, privilege, authority, or relief under or from any provision of the act, any regulation or requirement made pursuant to a power granted by such act, or any other statute conferring jurisdiction upon the Commission.

(c) "Commission" means the Interstate Commerce Commission.

(d) "Detailed environmental impact report" (DEIR) is a report to be filed by each applicant along with the application containing the information as set forth in § 1108.12(a) in those instances when an environmental impact statement is normally prepared.

(e) "Environmental impact" is any alteration of environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration.

(f) "Environmental impact statement" (EIS) is a complete and fully comprehensive environmental analysis including such formal review as may be provided by other Federal, State, and local agencies and the public pursuant to section 102(2)(C) of NEPA. The EIS is developed in two stages, draft and final.

(g) "Supplemental environmental evaluation" (SEE) is a statement containing the information required by § 1108.12 (b) or (c), as appropriate. A supplemental environmental evaluation shall be filed by each applicant, proponent, or complainant seeking authorization or relief in actions listed in § 1108.9(a).

(h) "Environmental threshold assessment survey" (TAS) is a written Environmental Affairs Staff study concluding that an EIS is not necessary. The study includes a review of the proposed action, the supplemental environmental evaluation, and other available data. The TAS identifies areas of relevant environmental concern and assesses alternatives to the proposed action.

(i) "Federal action" includes the entire range of activities undertaken by the Commission.

(j) "Major Federal action" is any Federal action which requires the substantial commitment of resources or triggers such a substantial commitment by others.

(k) "NEPA" means the National Environmental Policy Act of 1969.

(l) "Summary environmental negative declaration" (SEND) is a statement in an initial procedural order indicating that the proposal is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Subpart C—Designation of Responsibility

§ 1108.7 Designation of responsible staff.

(a) The Environmental Affairs Staff is assigned the responsibility of preparing environmental impact statements and related documents.

(b) The Assistant to the Director for Environmental Affairs shall maintain liaison for the Commission with the Council on Environmental Quality, the Environmental Protection Agency (EPA), and the other departments and agencies with interest or expertise in environmental matters. Duties of the Assistant to the Director for Environmental Affairs, or designees, shall include, among other things:

(1) Coordination of environmental policies with Commission practices and procedures;

(2) Supervision of the Environmental Affairs Staff in carrying out the functions and responsibilities duly assigned;

(3) Preparation of a quarterly list of all environmental impact statements and threshold assessment surveys prepared under the circumstances set forth in § 1108.13(b); and

(4) Provision of advisory assistance to Commission decisionmakers (groups and individuals) in any proceeding or action wherein there arises environmental issues requiring the special competence and expertise of the multidisciplinary Environmental Affairs Staff.

Subpart D—Identification of Major Federal Actions Significantly Affecting the Quality of the Human Environment

§ 1108.8 Actions significantly affecting the quality of the human environment.

(a) In determining whether a proposed action will significantly affect the quality

of the human environment consideration will be given to:

(1) The extent to which the action will cause environmental effects in excess of those created by existing uses in the area affected by it;

(2) The absolute quantitative environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area; and

(3) The extent to which the proposed action is consistent with local land use plans.

(b) In determining whether an action is a major Federal action, consideration will also be given to the following:

(1) Whether the action is environmentally controversial;

(2) Whether proposed actions, though individually limited, may cumulatively have a significant environmental impact; and

(3) Whether the proposed action involves secondary or indirect effects upon patterns of social and economic activity.

(c) If it is determined that the Federal action contemplated is "major" and will have a significant impact on the quality of the human environment, the Environmental Affairs Staff will prepare an EIS in accordance with § 1108.14 Such actions include, but are not limited to, actions which would have a significant impact or effect on:

(1) Air, noise, or water pollution;

(2) Consumption of energy or natural resources;

(3) Diversion of traffic from one mode of transportation to another;

(4) Land use plans, policies, or controls;

(5) Recreation sites or wildlife areas;

(6) Publicly owned lands or parks;

(7) Areas of cultural, historical, or archaeological significance; or

(8) The safety of the community.

(d) The following classes of actions have the potential for significant environmental impact and normally require an EIS:

(1) Rail line constructions;

(2) Commuter fare increases;

(3) Discontinuance of passenger trains; and

(4) Merger, control, or consolidation involving two or more class I railroads.

(e) If for some reason an EIS is not required for an action included in one of the classes listed in paragraph (d) of this section, the following procedure will apply:

(1) The Environmental Affairs Staff will normally prepare a TAS in accordance with § 1108.13; and

(2) The Commission will notify all parties, CEQ, and the public that an EIS will not be prepared.

§ 1108.9 Actions with a potential effect on the environment.

(a) The following classes of actions may have environmental issues present, but normally do not require an EIS:

(1) Abandonment, acquisition, or operation of a line of railroad;

(2) Common use of rail terminals;

(3) Railroad merger, purchase, control, or trackage rights proceedings, except as provided in § 1108.8(d)(4);

(4) Water carrier certification;

(5) Investigation and suspension, rate complaint, or formal docket cases involving recyclable commodities;

(6) Rulemaking and legislative proposals affecting carrier operations; and

(7) General rate increases.

(b) Actions listed in paragraph (a) of this section will be examined on a case-by-case basis, with the supporting data, in order to determine whether a SEND is appropriate, or whether further environmental analysis, in the form of an EIS or TAS, may be required.

§ 1108.10 Actions where no environmental issues are present.

(a) If it is determined that the Federal action contemplated is not "major" in character within the meaning of NEPA, or that the environmental impacts are inconsequential or not cognizable under NEPA, or that the allegations of impacts are frivolous, an initial procedural order shall include a SEND stating that the proposal is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

(b) For proceedings not listed in §§ 1108.8(d) and 1108.9(a) the initial procedural order will normally contain a SEND. If any interested person, or the Commission on its own initiative, identifies environmental issues of consequence, an action falling within the scope of this section will be subject to further environmental evaluation.

(c) If environmental issues of consequence arise after a SEND has been served, the Commission shall assess such issues and, in appropriate instances, prepare a TAS or EIS.

§ 1108.11 Review of environmental determination.

Any determination with respect to environmental issues will be subject to Commission review in the same manner as other issues in the proceeding.

Subpart E—Environmental Procedures

§ 1108.12 Reporting requirements.

(a) *Detailed environmental impact report (DEIR).*—Every application within § 1108.8(d) shall include a DEIR, similar in scope to an EIS under section 102(2)(C) of NEPA.

(1) A DEIR will include, but not be limited to, a discussion of the following, as appropriate:

(i) A description of the proposed action;

(ii) The relationship of the proposed action to land use plans, policies, and controls for the affected area;

(iii) The probable impacts of the proposed action on the environment, including secondary or indirect, as well as primary or direct, impacts;

(iv) Alternatives to the proposed action;

(v) Any adverse environmental effects which cannot be avoided;

(vi) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(vii) Irreversible and irretrievable commitments of resources which will be involved in the proposed action should it be implemented.

(2) The DEIR should also address the considerations set forth in §§ 1108.8 (b) and (c), as appropriate.

(3) For actions described in § 1108.8 (d), applicants may contact the Assistant to the Director for Environmental Affairs for assistance and advice on how to prepare the DEIR. Early and continuing consultation with the Assistant to the Director for Environmental Affairs, even prior to the filing of the application, is encouraged. This consultation should regard, among other things: (i) The need for consultants and experts for special studies (such as archaeological surveys, diversion modeling, et cetera), (ii) Specification of additional environmental information required, and (iii) Early awareness of related Federal actions proposed by applicant or others.

(b) *Supplemental environmental evaluation (SEE).*—(1) Every applicant, complainant, or proponent instituting an action described in § 1108.9(a) shall submit an SEE which, except as provided in paragraph (2)(b) of this section, shall be included with the application.

(2) A SEE for an investigation and suspension or a formal docket case involving recyclable commodities must be submitted within thirty (30) days after service of the order of investigation.

(3) The SEE shall include a discussion of the following, as appropriate:

(i) A description, in narrative form, of the contemplated action;

(ii) An indication of related applications or proposals before the Commission or not yet filed but contemplated;

(iii) The involvement of any other Federal, State, or local governmental agency (including the need for additional permits or licenses or the expectation of funding or financing);

(iv) The anticipated environmental impacts;

(v) Anticipated increases in energy requirements or natural resource consumption;

(vi) Probable and potential changes in transportation patterns;

(vii) The anticipated amount of traffic diversion to alternate modes of transportation, and, if no diversion is anticipated, the reasons why; and

(viii) The alternatives to the proposed action which applicant, proponent, or complainant has considered.

(c) *Additional environmental information for rail abandonment applications.*—In addition to the information listed in paragraph (b) of this section applications to abandon a line of railroad, or operations over such line, shall include the following, as appropriate:

(1) A description, in narrative form, of the contemplated action, including the involvement of other railroads and related abandonment, construction, or trackage rights applications;

(2) A detailed map showing the exact location of the line to be abandoned and its relationship to other railroad lines;

(3) The most recently available traffic figures for the line in question, including type of commodities transported, the amount of carloads and tons handled, and a breakdown of traffic received and forwarded at each station on the line;

(4) The number of acres in the right-of-way proposed for abandonment and, stated separately, in the railroad property appurtenant thereto;

(5) Other contemplated abandonment applications which will have a direct effect on the geographic region involved in the pending application, and an analysis of the manner in which the line to be abandoned fits in with the applicant's overall operations and with available transportation service in or through the affected area;

(6) The number, type, and location, including a description, of all bridges, culverts, and grade crossings, or any other structures on the line;

(7) The anticipated plans for salvage operations, including the removal or sale of rail and ties, and the plans for removal of bridges and all structures, and steps to be taken to avoid the creation of public safety hazards as a result of salvage operations;

(8) Federal, State, or local laws or ordinances relating to salvage operations;

(9) The general nature of ownership of the underlying right-of-way, and specific plans for the property made available for disposition by the abandonment;

(10) A description of current land use in the area directly adjacent to the line and in the tributary territory; and

(11) The kind and amount of property taxes paid by the railroad to the local communities in the last 2 calendar years.

(d) *Applicant's environmental declaration.*—Applications described in § 1108.10 shall include a statement indicating the presence or absence of any environmental impact of the proposed action. If environmental impacts, either adverse or beneficial, are alleged, they must be identified and quantified to the maximum extent practicable.

(e) *Representations of other parties.*—Persons filing a protest or other representation in a proceeding before the Commission may include a statement indicating the presence or absence of environmental impacts. A statement alleging a significant environmental impact shall indicate with specific data the exact nature and degree of the anticipated impact.

(f) *Additional information.*—The supplemental information required by the previous paragraphs shall not preclude the Commission from requiring additional information from a party needed to make a determination as to the environmental significance of the contemplated action. The Commission may require a party to perform additional contract or other studies deemed necessary to enable full and complete evaluation of pertinent environmental issues.

§ 1108.13 Preparation of environmental threshold assessment surveys.

(a) Upon a determination that a proposed action will not have a significant effect on the environment, but the potential environmental impacts are such that a SEND is not appropriate, a TAS will be prepared.

(b) In addition, if it is determined that an EIS is not necessary for a proposed action (1) Identified in § 1108.8(d) as normally requiring an EIS, (2) Similar to prior actions for which an EIS has generally been prepared, (3) Which the Commission previously announced would be the subject of an EIS, or (4) For which the Commission has received a request from CEQ to prepare an EIS, a TAS will normally be prepared setting forth the reasons why an EIS is not being prepared.

(c) The TAS shall include, but not be limited to, the following:

(1) A statement of the facts, describing the proposed action;

(2) Identification of all areas of relevant environmental concern and reasons why impacts are insignificant; and

(3) Discussion of the alternatives to the action and the anticipated environmental consequences of such alternatives.

(d) Notice of the conclusions in the TAS will be served on all parties and will be made available to the public by publication in the FEDERAL REGISTER and/or publication in local newspapers.

(e) Substantive comments of an environmental nature received in response to the notice specified in paragraph (d) of this section shall be filed in writing within 30 days of the date of service of said notice. Comments received will be considered and a determination made to (1) Affirm the prior finding of no signif-

icant impact without modification, (2) Modify or amend the TAS, or (3) Prepare an EIS for the proposed action.

§ 1108.14 Preparation of environmental impact statements.

(a) *General.*—Upon a determination that a proposed action may have a significant effect uopn the quality of the human environment, the Environmental Affairs Staff will prepare an EIS. The EIS is normally comprised of two stages, draft and final. The draft statement must satisfy to the fullest extent possible, at the time of its preparation, the requirements established for final statements by section 102(2)(C) of NEPA. An EIS shall be prepared early enough to be part of the decisionmaking process on the proposed action to which it relates.

(b) *Draft environmental impact statements.*—In preparing draft EIS the Environmental Affairs Staff will take into account the guidelines set forth in 40 CFR 1500.7–1500.8 (28 FR 20552–3). Draft statements will set forth in detail:

(1) The environmental impact of the proposed or contemplated action;

(2) Adverse environmental effects which cannot be avoided should the proposed or contemplated action be implemented;

(3) Alternatives to the proposed or contemplated action;

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(5) Irreversible and irretrievable commitments of resources which would be involved in the proposed or contemplated action should it be implemented.

In some cases environmental impact statements may be prepared by private consultants. In all cases the Commission will make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental impact statements.

(c) *Filing and distribution of draft environmental impact statements.*—Draft EIS will be filed in the docket and distributed to CEQ, EPA, the parties, and Federal agencies having special expertise or jurisdiction with respect to related environmental impacts and authorized to develop and enforce relevant environmental standards (See appendixes II and III to 40 CFR 1500 (38 F.R. 20557–62)). Draft EIS will also be made available to State and local governments, as appropriate, and to other interested persons.

(d) *Request for comments on draft environmental impact statements.*—The draft statement shall be accompanied by a notice requesting comments on the draft. Normally the comments will be due within forty-five (45) days from the date the draft EIS is made available to CEQ and the public. An original, and to the extent practicable, six (6) copies of any such comments should be submitted to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423.

(e) *Final environmental impact statements.*—After receipt of comments on the draft statement, the Environmental Affairs Staff will prepare a final EIS in accordance with the requirements for draft statements. To the extent opposing professional views and responsible opinion on the environmental effects of the proposed or contemplated action have not been discussed in the draft statement, but are brought out by the comments, the environmental effect of the action will be reviewed in the light of those comments. The final EIS will contain responsive reference to such views and opinion. All substantive comments on the draft EIS (or summaries thereof where the response is voluminous) will be attached to the final EIS, whether or not each such comment is thought to merit individual discussion in the text of the statement. The final EIS will be filed and distributed to those who submitted substantive comments on the draft statement. In all instances the final EIS will be distributed to CEQ, EPA, all parties to the proceeding, and any person requesting a copy. The final EIS and substantive comments received on the draft statement will accompany the proposal through the Commission's review process.

§ 1108.15 Public meetings in preparation of environmental impact statements.

During the preparation of an EIS where issues are unusually complex or there is substantial public controversy, the Commission may call public meetings for further input. Such public meetings may be scheduled independently of or in conjunction with formal public hearings which may be held for a particular proceeding. Formal transcripts of such meeting normally will be made.

§ 1108.16 Minimum periods for review.

(a) To the maximum extent practicable, no final administrative action subject to section 102(2)(C) of NEPA will be taken sooner than ninety (90) days after the date the draft statement is made available to CEQ and the public. Neither shall such final administrative action be taken sooner than thirty (30) days after the date the final EIS has been available to CEQ and the public. The ninety (90)-day and thirty (30)-day periods described above may run concurrently to the extent they overlap.

(b) When oral hearings are contemplated for a particular proceeding in which an EIS has been prepared, the final EIS will be available to the public at least fifteen (15) days prior to that portion of the oral hearing relating to the impact statement, except as provided in subsection (d).

(c) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the Commission will consult with CEQ about alternative arrangements.

(d) In light of the statutory obligations of this Commission to decide certain cases within a limited time period, the commenting period for the draft statement may be limited to thirty (30) days with no extensions of time granted. In addition, the thirty (30)-day waiting period after the issuance of the final EIS shall be shortened as necessary. In the event that statutory time limitations in a particular proceeding make it impractical to comply with the procedures as specified in these rules, the final EIS may be issued after the conclusion of the evidentiary hearings. In the event that any decision rests upon matters contained in a final impact statement issued after the conclusion of evidentiary hearings, any party may request an opportunity to show the contrary.

Subpart F—Final Determinations

§ 1108.17 Hearing procedure.

(a) Subject to procedural requirements imposed by the Commission consistent with this part, in appropriate oral hearing cases the final EIS will be submitted for the record.

(b) Any party may take a position, offer probative evidence, and cross-examine witnesses of both the Environmental Affairs Staff (with respect to the preparation of the statement) and the applicant or others (with respect to the environmental information supplied by them), in light of the final EIS and on environmental issues within the scope of the proceeding. The Commission may designate counsel for Environmental Affairs Staff members called as witnesses on environmental matters.

§ 1108.18 Initial and final decisions.

(a) Where environmental matters are in issue in a proceeding, the initial decision will include all necessary findings and conclusions on such issues. It may also include findings and conclusions which affirm or modify the content of an EIS or TAS. To the extent such findings and conclusions differ from those in the EIS or TAS, the EIS or TAS will be deemed modified to that extent.

(b) If the Commission in a final decision reaches conclusions different from those contained in an initial decision with respect to environmental issues, the EIS or TAS will be deemed modified to that extent.

Subpart G—Miscellaneous Provisions

§ 1108.19 Official notice.

The Commission may take official notice of any facts relating to the environmental situation before it. This shall include facts set forth in documents such as scientific studies, environmental impact statements, governmental reports, and maps, which have not been presented in evidence by any party of record. In the event any decision rests upon official notice of any such fact, any party may, within a period allowed for the filing of exceptions or petitions for reconsideration, request an opportunity to show the contrary.

§ 1108.20 Cost of materials distributed to the public.

Copies of draft and final environmental impact statements and threshold assessment surveys will be made available to the public upon request without charge, to the extent practicable, or at a fee not exceeding actual reproduction costs.

49 C.F.R. § 1108.6 (1981)

NW., Washington, D.C. 20423, Telephone: 202-275-7916.

§ 1108.4 Definitions.

In addition to those definitions contained in the Council on Environmental Quality's Regulations (40 CFR 1508), the following definitions apply to the Commission's NEPA process:

(a) "Act" means the Interstate Commerce Act, Subtitle IV of Title 49, United States Code, as amended.

(b) "Assessment" means a concise public document for which the Commission is responsible, that serves:

(1) Briefly to provide sufficient information for determining whether to prepare an environmental impact statement or to make a finding of no significant impact; and

(2) To facilitate preparation of an environmental impact statement when one is necessary.

(c) "Commission" means the Interstate Commerce Commission.

(d) "Environmental Impact Statement" (EIS) means a detailed written statement as required by section 102(2)(c) of NEPA.

(e) "Finding of No Significant Impact" is a document issued by the Commission briefly presenting the reasons why an action not categorically excluded will not have a significant effect on the quality of the human environment and for which an environmental impact statement therefore will not be prepared.

(f) "Environmental Report" or "report" means an analytical document which briefly evaluates the environmental impacts of a proposed action and alternatives. It is to be filed by an applicant with the Commission pursuant to the requirements of this part.

§ 1108.5 Determinative criteria.

In determining whether a "major Federal action," as that term is defined at 40 CFR 1508, has the potential to affect significantly the quality of the human environment, the Commission will be guided by the definition of "significantly" at 40 CFR 1508.

§ 1108.6 Classification of actions.

(a) Rail line construction is a class of action that has the potential for significant environmental impact; and will normally require an Environmental Impact Statement (EIS).

(b) The following classes of action may involve significant envrionmental impacts, but normally will be addressed in an environmental assessment:

(1) Abandonment, acquisition, or operation of a line of railroad;

(2) Railroad merger, control, or consolidation proceedings;

(3) Discontinuance of passenger trains;

(4) Individual and general freight rate proceedings involving recyclable commodities;

(5) Commutation or suburban passenger fare increases, but only if the proposed increase, when considered together with other increases over the previous 3 years, exceeds by 30 percent (on a compounded basis) the combined inflation rate (as measured by the Consumer Price Index) for those years; and

(6) Legislative proposals, policymakings, and rulemaking proposals affecting carrier operations.

(c) Environmental impacts associated with the following classes of action are insignificant (or ascertainable under other reporting requirements) and, therefore, environmental reports and documentation normally need not be prepared under this part:

(1) Interpretation of operating rights and tariffs;

(2) Proceedings involving only a change in ownership or similar changes, such as issuance of securities or reorganization, but not involving a change in carrier operations including overall levels of employment;

(3) Individual and general freight rate proceedings except to the extent recyclable commodities are involved;

(4) Motor and water carrier, broker, and freight forwarder licensing;

(5) Intercity bus fare adjustments;

(6) Revocation or substantial modification of motor carrier service; and

(7) Applications for common use of rail terminals and trackage rights proceedings.

(d) The classifications established in paragraphs (a), (b), and (c) of this section are not invariable and, where circumstances warrant, the Commission,

on its own initiative or upon request, may reclassify, waive or otherwise modify requirements with respect to any proposed action. Where an action categorically excluded from environmental analysis may have significant environmental impacts; an assessment or an EIS may be prepared:

§ 1108.7 Reporting requirements.

(a) Each applicant initiating one or more of the classes of action identified in § 1108.6 (a) or (b) must submit with its application an Environmental Report as provided in paragraph (c) of this section which will form the basis of any environmental document. Where it is determined that a report should be prepared by an applicant in a categorically excluded proceeding, the applicant will be notified separately and shall submit a report within time limits established in the notification.

(b) Where information required by this part is otherwise included in applicant's pleadings, it may be incorporated by reference into the Environmental Report.

(c) Each Environmental Report shall respond completely to the following questions relative to the proposed action, to the extent applicable. If a question is inapplicable, so state.

(1) *Alternatives.* Have alternatives to the proposed action (*e.g.*, no action or partial approval) been considered? If so, summarize the major environmental impacts associated with each alternative.

(2) *Transportation System.* (i) Will existing regional or local transportation systems or patterns be substantially affected? If so, describe the effects. (ii) Will traffic (passengers or freight) be diverted to other transportation modes or systems? If so, quantify the extent of expected diversion.

(3) *Land Use.* (i) Is the proposed action consistent with regional and/or local land use plans (Local and/or regional planning agencies should be consulted in this regard)? If not, describe any inconsistency. (ii) Is a designated Coastal Zone Management area involved? If so, is the proposed action consistent with the affected State's Coastal Zone Management program? (iii) Are designated wetlands or 100-year flood plains affected? If so, describe the effects. (iv) Are prime agricultural lands, as designated by the Soil Conservation Service, affected? If so, describe the effects.

(4) *Energy.* (i) Will the development of transportation of energy resources be affected? If so, describe the effects. (ii) Will the movement and/or recovery of recyclable commodities be affected? If so, describe the effects. (iii) Will the proposed action cause diversion of traffic from rail to motor carriers in excess of (A) 1,000 rail carloads per year or (B) an average of 50 rail carloads per mile per year for all or any part of an affected rail line? If so, quantify the net change in energy consumption as a result of diversion, providing commodity, tonnage, and carload data by station where only part of an affected rail line is involved.

(5) *Air.* Will the proposed action result in (i) a minimum increase in rail traffic of 50 percent or three trains per day on an affected rail line, (ii) an increase in rail yard activity of 20 percent as measured in carload activity or (iii) an increase in motor carrier traffic of either 50 vehicles per day or an increase in truck traffic exceeding 10 percent of the average daily traffic on a given highway segment? If any of the enumerated thresholds is exceeded, quantify the anticipated increase in air emissions. If a class I or nonattainment area is affected, are increased emissions within parameters of the affected State Implementation Plan?

(6) *Noise.* If any of the thresholds identified in item (5) is surpassed, will the proposed action cause an increase in noise levels exceeding either (i) a four decibel incremental increase or (ii) 65 decibels (Utilize the Leg method or its equivalent in Ldn. See *e.g.*, U.S. Environmental Protection Agency, Protective Noise Levels (Nov. 1978))? If so, are sensitive receptors (*e.g.*, schools, libraries, and hospitals) in the affected area? If so, how much above existing or ambient conditions will noise increase for senstive receptors?

(7) *Safety.* Will public health or safety (including vehicle delay time at railroad grade crossings) be affected? If so, describe the effects.

property is retained for reuse, the salvage value shall be recorded in account 712, Materials and Supplies, or other appropriate account at an amount not to exceed its recorded cost (actual or average), or current market value, whichever is lower.

32. *Segment of a business* refers to a component of an entity whose activities represent a separate major line of business or class of customer. A segment may be in the form of a subsidiary, a division, or a department, and in some cases a joint venture or other non-subsidiary investee, provided that its assets, results of operations, and activities can be clearly distinguished, physically and operationally and for financial reporting purposes, from the other assets, results of operations, and activities of the entity. The fact that the results of operations of the segment being sold or abandoned cannot be separately identified strongly suggests that the transaction should not be classified as a disposal of a segment of business.

(a) *Measurement date* means the date on which the management having authority to approve the action commits itself to a formal plan to dispose of a segment of the business, whether by abandonment or sale. The measurement date for disposals requiring Commission approval shall be the service date of the Order authorizing the disposal.

(b) *Disposal date* refers to the date of closing the sale, if the disposal is by sale or the date that operations cease if the disposal is by abandonment.

33. *Service life* means the period between the date when operating property is placed in service and the date of its retirement.

34. *Service value* means the ledger value of operating property less its salvage value (see definition 17).

35. *Track maintenance* is material and labor costs of routine track repairs such as sporadic tie replacement, repair of broken rails, tightening track bolts and track spikes. A more complete list of maintenance items are included in notes to the text of Accounts 8, 9 and 11.

36. *Work equipment* means equipment which can be coupled in a train for movement over the carrier's tracks, and which is used in the carrier's work service. See equipment listing for account 57, *Work equipment.*

[42 FR 35017, July 7, 1977, as amended at 44 FR 3493, Jan. 19, 1979; 45 FR 31110, May 12, 1980; 48 FR 7183, Feb. 18, 1983; 48 FR 33718, July 25, 1983; 49 FR 2254, Jan. 19, 1984; 52 FR 4321, Feb. 11, 1987]

GENERAL INSTRUCTIONS

1–1 *Classification of carriers.* (a) For purposes of accounting and reporting, carriers are grouped into the following three classes:

Class I: Carriers having annual carrier operating revenues of $250 million or more after applying the railroad revenue deflator formula shown in Note A.

Class II: Carriers having annual carrier operating revenues of less than $250 million but in excess of $20 million after applying the railroad revenue deflator formula shown in Note A.

Class III: Carriers having annual carrier operating revenues of $20 million or less after applying the railroad revenue deflator formula shown in Note A.

(b)(1) The class to which any carrier belongs shall be determined by annual carrier operating revenues after the railroad revenue deflator adjustment. Families of railroads operating within the United States as a single, integrated rail system will be treated as a single carrier for classification purposes. Upward and downward reclassification will be effected as of January 1 in the year immediately following the third consecutive year of revenue qualification.

(2) If a Class II or Class III carrier's classification is changed based on three years' adjusted revenues the carrier shall complete and file the Classification Index Survey Form with the Board by March 31 of the year following the end of the period to which it relates.

(3) Newly organized carriers shall be classified on the basis of their annual carrier operating revenues after railroad revenue deflator adjustment for the latest period of operation. If actual data are not available, new carriers shall be classified on the basis of their carrier operating revenues known and estimated for a year (after railroad revenue deflator adjustment).

(4) When a business combination occurs, such as a merger, reorganization, or consolidation, the surviving carrier shall be reclassified effective January 1 of the next calendar year on the basis of the combined revenue for the year when the combination occurred (after railroad revenue deflator adjustment).

(5) In unusual circumstances, such as partial liquidation and curtailment or elimination of contracted services, where regulations will unduly burden the carrier, the carrier may request the Board for an exception to the regulations. This request shall be in writing specifying the conditions justifying an exception.

(c) Class I carriers shall keep all of the accounts of this system which are applicable to their operations. Class II and III carriers are not required to maintain the accounts of this system.

(d) All switching and terminal companies, regardless of their operating revenues will be designated Class III carriers.

(e) Unless provided for otherwise, all electric railway carriers, regardless of operating revenues, will be designated Class III carriers.

NOTE A: The railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows:

Current Year's Revenues × (1991 Average Index/Current Year's Average Index)

NOTE B. See related regulations 49 CFR 1241.15 Railroad classification survey form.

[57 FR 27185, June 18, 1992; 57 FR 31754, July 17, 1992; 66 FR 56245, Nov. 7, 2001; 67 FR 57533, Sept 11, 2002]

1–2 *Classification of accounts.* (a) Accounts are prescribed to cover cost of property used in transportation operations and operations incidental thereto and for revenues, expenses, taxes, rents, and other items of income for such operations. Separate accounts are prescribed for investment in property not used in transportation operations and for other investments and income therefrom; for unusual and infrequent items; for operations and disposal of discontinued segments; for extraordinary items and accounting changes; and for assets, liabilities and capital includable in the balance sheet statement. Retained earnings accounts form the connecting link between the income account and the equity section of the balance sheet. They are provided to record the transfer of net income or loss for the year; certain capital transactions; and, when authorized by the Board, other items.

(b) The cost of property, and the revenues, expenses, taxes and rents for miscellaneous operations involving the use of such facilities as hotels, restaurants, grain elevators, storage warehouses, power plants, cold storage plants, etc., shall not be included in the accounts prescribed for transportation operations unless the operation of the facilities is conducted by the railway companies in connection with furnishing transportation services. Likewise, the cost of property, the revenues, expenses, taxes, and rents arising from the operation of stockyards shall not be included in accounts prescribed for transportation operations unless operation of the facilities is conducted in connection with transportation of livestock. It is not intended that cost of property and income arising from incidental public stockyards service rendered by stockyards primarily devoted to transportation services shall be excluded from transportation operation accounts.

(c) Joint facility accounts are provided for the joint users of tracks, bridges, yards, wharves, stations, and other facilities in which to record items in settlement for use of such facilities. When the compensation for the use of facilities is a fixed amount or is based upon a charge per passenger, ton, car or other unit, the amount shall be fairly apportioned by the operating company among the joint facility operating expense and income accounts. The creditor shall show the distribution of these charges upon its bills, and such distribution shall be adhered to by the debtor. Train service in connection with the line haul of traffic, including that operated under a joint arrangement for the benefit of two or more carriers, is not considered a joint facility operation.

(d)(1) *Extraordinary Items.* All items of profit and loss recognized during the year are includable in ordinary income unless evidence clearly supports their classification as extraordinary items.

INTERSTATE COMMERCE COMMISSION

STUDY OF INTERSTATE COMMERCE COMMISSION REGULATORY RESPONSIBILITIES

Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994

Chairman Gail C. McDonald
Vice Chairman Karen Borlaug Phillips
Commissioner J. J. Simmons, III
Commissioner Linda J. Morgan
Commissioner Gus A. Owen

October 25, 1994

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adverse competitive effects, the Commission then balances those effects against the public interest in meeting significant transportation needs to determine if the consolidation should nevertheless be approved.[29]

In all consolidations, the ICC can condition its approval of the transaction.[30] Moreover, the ICC must impose labor conditions to protect employees adversely affected by a consolidation.[31]

Purpose

This regulatory regime is intended to promote socially desirable mergers and other consolidations in the rail industry that are in the public interest and promote important transportation goals. Mergers that permit meaningful rationalization of the nation's rail facilities and reduce excess capacity within the rail industry can yield substantial benefits to the national economy even though they might not pass muster under a strict antitrust analysis. Because the multiple public interest factors that must be considered are all important in fostering efficient transportation, the Commission is to weigh and balance these factors in deciding whether to permit such consolidations.

Implementation

A series of major, Commission-approved consolidations in the late 1970s and early 1980s substantially reshaped the rail industry and contributed greatly to the industry's financial revival.[32] Another round of major rail consolidations is now being proposed,[33] as the railroad industry strives to become even more efficient and offer "seamless service."

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[29] 49 U.S.C. 11344(d)(2).

[30] 49 U.S.C. 11344(c).

[31] 49 U.S.C. 11347. Labor protection is treated differently for line sales to noncarriers under 49 U.S.C. 10901. See the discussion below in "Line Sales to Noncarriers" and "Labor Protection."

[32] Burlington Northern -- Control & Merger -- St. Louis San Francisco Ry., 360 I.C.C. 788 (1980); CSX Corp. -- Control --Chessie System and Seaboard Coast Line Indus., 363 I.C.C. 521 (1980); Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. and Southern Ry., 366 I.C.C. 173 (1982); Guilford Transp. Indus. -- Control -- Boston & Maine Corp., 366 I.C.C. 292 (1982); Union Pacific--Control--Missouri Pacific, 366 I.C.C. 462 (1982); Chicago, Milwaukee, St. P. & P. -- Reorganization -- Acquisition By Grand Trunk, 2 I.C.C.2d 161 (1984) (Soo Line acquisition of Milwaukee's core lines); Rio Grande Indus. -- Control -- Southern Pacific Transp., 4 I.C.C.2d 834 (1988).

[33] This includes the Union Pacific-Chicago & North Western and the Burlington Northern-Santa Fe proposals now pending before the Commission and the Illinois Central-Kansas City Southern proposal expected to be filed soon, as well as others that are now under discussion, according to press reports.